IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	:	
Complainant,	:	
v.	:	CASE NO. 66,596 and 68,771
JOHN H. KEANE,	:	
Respondent.	:	

FILED
SID J. WHITE
MAY 9 1988
CLERK, SUPREME COURT
By
Deputy Clerk

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

(Procedural History)

(Citations are to Appendix Pages)

The Bar commences its Statement of the Case on November 6, 1984, when pursuant to a contract of plea negotiation, respondent entered an Alford plea to one of the same sixteen counts that were alleged in the Bar complaint. The State dropped the other fifteen. Respondent's present difficulties actually began on April 20, 1984, with his suspension from office as Public Defender of Monroe County after twelve years service, based upon the same charges.

The plea contract provided that:

> "Mr. Keane shall agree to voluntarily surrender by written stipulation, sixty days from the date of his sentencing, his license to practice law in Florida. Such voluntary suspension shall perpetuate until disciplinary proceedings instituted by The Florida Bar have been resolved. Pursuant to the written stipulation, Mr. Keane will not engage in the practice of law. However, if through no delay by Mr. Keane, resolution of his bar status has not occurred within one hundred and eighty days of the license surrender and written stipulation of suspension, this plea agreement does not prevent Mr. Keane from seeking a termination, modification or amendment to his voluntary suspended bar status." (63)

Was the plea contract the "written stipulation" contemplated by this clumsily drafted paragraph, or was this clause an "agreement to agree"? If the latter, was respondent to stipulate with the State Attorney or with The

Florida Bar?

Respondent tried unsuccessfully to communicate with the State Attorney to clarify this point. (82) On December 28, he received a letter from The Bar stating "As of this date our office has not received your written stipulation concerning your agreement to accept suspension..." (80) The Bar either contemplated a stipulation between respondent and the State Attorney, or was misusing the term "stipulation."

Respondent could not force the State Attorney to communicate, much less stipulate. He spoke to his probation officer about this hiatus and was advised to write the probation officer a letter stating that he had terminated his practice. (82) Respondent complied on January 4, within the 60 day period contemplated by the plea contract. (83) His letter said:

> "Please be advised that as of this date I am commencing a voluntary abstention of the practice of law in Florida for a period of six months, (unless sooner disposed of by the Florida Bar?)."

This did not strictly track the language of the plea contract, which contemplated respondent "seeking a termination, modification or amendment" if "resolution of his bar status has not occurred within one hundred and eighty days of the license surrender and written stipulation of suspension." But it satisfied the probation officer and served the immediate purpose until a written stipulation

could be entered.

Respondent's lawyer advised Bar counsel of the circumstances surrounding this letter. (72) The Bar's reaction was a petition for temporary suspension, filed on February 22, 1985, pursuant to Article XI, Rule 11.10(6) of the Integration Rule of The Florida Bar, accusing respondent of "a transparent attempt to circumvent the professional (sic) requirements of a formal suspension order." (41) (Bar counsel later told the referee it was a "felony suspension" contemplated by Integration Rule 11.07(2).) (340)

Rule 11.10(6) required "an affidavit demonstrating facts personally known to affiant showing that an attorney appears to be causing great public harm by misappropriating funds to his own use, or otherwise." The unsworn petition was not supported by an affidavit and did not allege that respondent was causing great public harm.

Respondent's lawyer inexplicably failed to respond to the petition. In his affidavit Mr. Halpern says:

> No response to this Petition was indicated nor was any Notice of Hearing therein provided to me. Since I was arranging for a hearing before the 'I6B' Grievance Committee through its Chairperson Synon, no appearance or response was submitted to the Florida Supreme Court." (72)

This Court, uninformed as to the petition defects, entered an order for a Rule 11.10(6) suspension based upon a premature, procedurally defective, factually inaccurate petition.

The Bar says that the Sixteenth Circuit Grievance Committee "recused itself because of past contacts with Mr. Keane." The record contains none of the grounds for recusal required by Rule 11.03(2)(c)(1), and familiarity with the accused attorney is typical of local grievance committees. The transfer to the 8th Circuit Committee was accomplished without notice to respondent. (72) Respondent's lawyer sent the 8th Circuit Committee a "Motion For Transfer Venue" pointing out that the then unemployed, suspended respondent "cannot afford the cost of travel for self and counsel [from Key West to Gainesville]." (74) It is not clear why, if recusal had been proper, the matter was not referred to a relatively nearby Dade County Committee, but the effect was to substantially prejudice and harass respondent.

The Chairman of the Eighth Circuit Committee denied the motion for change of venue without commenting upon respondent's financial predicament. (85, 87) He said, quite correctly, "... there is ... no provision in the integration rule for any ... change of venue in a grievance proceeding at the grievance committee level." (That had not deterred the Bar's ex parte transfer from Monroe County to Alachua County at great prejudice to respondent.) As one member of the Grievance Committee observed, "It [a motion objecting to Alachua County venue] should have been sent to the Supreme Court direct." (88)

The Bar says that on June 4, 1985, the Eighth Circuit Grievance Committee conducted a hearing and found probable cause on all counts, no surprise since respondent could not afford to attend or defend himself 500 miles from home, and the testimony of Bar witnesses is replete with conclusions and opinions. (See Grievance Committee transcript.)

On July 15, 1985, a successor attorney for respondent moved to vacate the order of temporary suspension, asking the Court to allow respondent to resume his law practice pending disciplinary proceedings. The Bar responded, repeating its incorrect allegation that a formal temporary suspension order was necessary because "Respondent would not comply with the conditions of his plea agreement." (94) The Bar also asserted, quite contrary to the plain language of Rule 11.10(6), that the rule "does not appear to mandate the supporting affidavit. The motion was denied on September 20, 1985. (104)

The Bar stalled from June 4, 1985, until May 16, 1986, before filing its complaint in this Court, while respondent waited, suspended from practice.

The Bar brief omits reference to respondent's pro se petition for an order dissolving the temporary suspension, filed July, 1986. (89) As "good cause" required for such relief (Rule 11.10(6)), respondent informed this Court that

there was no showing of "causing great public harm." Indeed, respondent was no longer public defender and could no longer commit offenses of the type alleged. The Bar's response did not challenge that valid proposition. Instead, the Bar contended, without any support from the applicable rule, that proof of rehabilitation was required. (106)

Respondent's petition was deferred until the referee's order dated November 20, 1987, which recommended academically that it be denied. (30) This 61 year old respondent, who is insolvent (108) and is acknowledged by the referee's report to have been suffering steadily deteriorating health during the pendency of this case (34), has thus been suspended without justification by applicable disciplinary rules for three years and two months as of the drafting of this brief. The referee has recommended suspension for an additional two years (2 1/2 years from October 19, 1987) (34). Respondent had voluntarily agreed to a suspension until the disciplinary proceedings were concluded with the right to request termination of suspension if that had not occurred within six months, which suggests that the plea contract did not contemplate disciplinary proceedings and a suspension spanning almost three years.

On October 27, 1986, Respondent's probation officer filed a motion for early termination of probation, stating

that respondent had complied with the rules and regulations of probation (this would include the plea contract provision for suspension "stipulation") and was no longer in need of supervision. Circuit Judge Helio Gomez promptly entered an order terminating the three year probation one year early. (109)

At the hearing before a referee, respondent's third lawyer* inexplicably stipulated into evidence the transcript from the ex parte Gainesville grievance committee hearing, with all its one sided opinions and conclusions. (111)

STATEMENT OF FACTS

Respondent, John H. Keane, "served many productive years in public service." He was a Navy fighter pilot during the Korean War** and was shot down four times. He has been a member of the Florida Bar since 1964. He served as Public Defender of Monroe County for 12 years. (33) He was a registered lobbyist in the Florida Legislature, lobbying for his own office, for the Florida Public Defenders Association, and for the Criminal Law Section of The Florida Bar. He was on the Executive Committee of the Criminal Law Section. (93)

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*The referee later observed "The Court is fully aware that you have been indigent throughout this time, unable to hold on to any attorneys to represent you... [ending] up representing yourself in the last hearing or two." (112)

**The referee's report erroneously says World War II. Respondent served on an aircraft carrier as an enlisted man during World War II.

For three years he was an instructor in the Prosecutor/Public Defender Trial Training Program, an intensive week-long program developed by the Criminal Law Section and the University of Florida for the training of assistant state attorneys and assistant public defenders.* (114, 115)

The Bar refers to paragraph 1 through 9 of the Referee's report, each of which finds that "Respondent falsely obtained reimbursement of travel expenses by submitting a State of Florida voucher for per diem." "Respondent unlawfully appropriated this state property for his personal travel...." Each of these findings refers to a time span, sometimes overlapping, (e.g. "Between April 29, 1983, and September 15, 1983," "Between August 13, 1983 and November 11, 1983," "Between September 29, 1983 and March 20, 1983.")

It is important to note that both the Bar complaint and the Referee's findings are narrowly limited to per diem recovered by submitting travel vouchers. Respondent was <u>not</u> accused of misappropriation by wrongful use of state vehicles

*According to Professor Gerald T. Bennett of the University of Florida College of Law, "Mr. Keane proved to be an exceptional instructor in that program." (114)

or gas credit cards.*

Expense vouchers submitted by respondent were frequently prepared weeks after actual travel due to the press of business, giving rise to minor errors as to relevant dates. (128) These documents, in which the minor discrepancies noted here are openly obvious, survived normal oversight procedures for years before the State Attorney and The Bar challenged nine vouchers of some 350 filed during those years. (38, 39)

The Bar exhibits dealing with this accusation of repeated false reimbursements are exhibits 2 through 10, consisting mostly of expense vouchers, gas credit card slips, and occasional telephone bills.

Exhibit 2 (130) shows respondent in Atlanta from October 19 - 22, then proceeding on personal leave. There is a gas slip in Gaffney, S.C., dated October 21 (132), which conflicts (if the gas station attendent in Gaffney did not forget to change the date on his credit card impressing machine). If gas actually was purchased in Gaffney on

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*Sworn statements from the Auditor General's office, the executive director of the Judicial Administrative Commission, and the 19th Circuit Public Defender disclose that respondent had freely disclosed such usages and believed them to be quite proper, in that he normally traveled to his North Carolina home instead of his Key West home, conducted business from his North Carolina home, and found it more economical than to return the vehicle a greater distance to Key West before proceeding on personal leave. (201, 203, 205, 206)

October 22, that would have been consistent with respondent leaving for his vacation cottage in North Carolina after completing business in Atlanta that day. The voucher shows travel resuming from Atlanta to Tallahassee October 25, in Tallahassee to October 28, and from Tallahassee to Key West on October 28. There are conflicting gas slips (Banner Elk, N.C., and Riceboro, Ga.) (133-134) which show the return trip to Tallahassee was actually on October 26.

Exhibit 3 (136) shows that respondent traveled from Key West to Tampa on January 24, 1980, attending a committee meeting in Tampa on January 25. On January 26 the voucher indicates 6:30 P.M. as the "time he would have arrived back in Key West." The voucher shows, however, that a personal leave commenced on January 27. There is a gas slip signed in Valdosta, Ga. (138), on January 25, which is consistent with completing the January 25 business and starting for North Carolina on personal leave that evening instead of spending the night in Tampa.

Exhibit 4 (141) indicates travel from Key West to New York October 27 - 29. Accompanying gas slips (143-150) indicate that respondent actually had been at Banner Elk, North Carolina, from at least October 15. Gas slips on October 27 in Banner Elk (150) and on October 28 in Oxford (north central North Carolina) (151) are consistent with proceeding to New York. A precisely correct voucher entry

would have shown respondent traveling from Key West to Banner Elk on or about October 14, with a gap for personal leave, then continuing to New York on October 28, but the per diem entitlement would have been the same. The voucher shows travel from New York to Key West November 1 - 3, and there are gas slips in route on November 3 and 4 in Fayetteville, North Carolina, Pocotaligo, South Carolina, St. Augustine, Fort Pierce and Florida City, (152-156) on a direct route back to Key West.

Exhibit 5 (157) shows a business trip from Key West to Tallahassee on December 27, 1980, a conference on December 28, and personal leave commencing December 29. There is a gas slip in Bowman, South Carolina, on December 28 (159), which again is consistent with respondent's custom of traveling on to North Carolina at the end of a business day instead of staying over in a hotel.

For Exhibit 6 (164), only one gas slip is dated during the time covered by the travel voucher. It is in Decatur, Georgia, on May 1, 1981. (166) The voucher shows respondent in Tallahassee on business from April 27 - 30, then on personal leave commencing April 30. Thus, this gas slip does not conflict with the voucher. The telephone bill (170) attached to this exhibit is entirely consistent with the personal leave from April 30 to May 3, showing calls from Tallahassee and Atlanta on May 1, and from Beech Mountain and

Banner Elk, North Carolina on May 3, 4, 6, 7 and 8. The voucher shows return travel from Tallahassee to Key West on May 3, but carries a note indicating that this was not the actual date of return. There is no indication of any other charge by respondent for return to Key West.

For Exhibit 7 (172), there is a gas slip in Decatur, Georgia, on July 1, 1982 (174), conflicting with the voucher indicating respondent was in Tallahassee July 1 - 2, unless the date on the slip is incorrect, or unless respondent left the Atlanta area for Tallahassee very early July 1. The voucher starts with July 1 and says "continued from June 30," but the Bar did not offer in evidence the voucher showing June 30. Although this voucher shows travel from Tallahassee to Key West on July 3, a notation on the voucher shows that actually respondent was on personal leave from July 3 and was back in Key West by July 12. The remaining gas slips (175-180) are consistent with personal leave in North Carolina and return to Key West by July 12. One of these gas slips demonstrates that gas station attendants are not necessarily reliable operators of credit card machines, because a Tallahassee slip is dated 17/12/82. (179) Telephone bills (181) show calls from Beech Mountain (the vicinity of Banner Elk) from July 2 through July 7 and are consistent with the personal leave time except for July 2, indicating an error on the voucher. There was no evidence who made the call.

Exhibit 8 (182) shows respondent traveling from Key West to Tallahassee May 1 for a meeting on May 2, with a personal leave commencing after the meeting. There is a gas slip at Charles Pucket's gas station in Banner Elk, North Carolina dated May 1 (184), which is inconsistent unless Mr. Pucket forgot to update his credit card machine and actually sold the gas to respondent on May 3 or thereafter. There is also a gas slip in Bowman, South Carolina on April 30 (183), which is consistent with traveling from Banner Elk to Tallahassee instead of the equivalent trip of Key West to Tallahassee. The telephone bill attached to the exhibit (186) shows a call from Beech Mountain, North Carolina, on May 4 and is thus consistent with the voucher.

Exhibit 9 (187) does not have gas slips attached. Two unidentified forms (189, 191) are attached which must be auditing or accounting forms referring to gas charge slips. The credit card numbers do not compare with the numbers on gas slips, nor does the signature, if it purports to be that of respondent. Exhibit 9 is useless as an evidentiary exhibit. The telephone bill attached (192) shows calls from Beech Mountain late on August 17 and on August 19, which would indicate that respondent actually went from Hollywood to Beech Mountain on August 17 rather than return to Key West as indicated by the voucher; but the voucher affirmatively shows no further per diem claim back to Key West after the

personal trip to North Carolina. Thus, only the date of the charge, not the charge itself, is erroneous.

The last entry on the travel voucher which is Exhibit 10 (194) shows respondent traveling from Tampa to Key West on September 30, 1983. Gas slips dated September 30 and October 1 (195-199) show him in route from Tampa to Banner Elk. There is no evidence indicating that respondent charged per diem for a later return trip when he traveled from Banner Elk back to Key West. The telephone statement attached to this exhibit (200) is entirely consistent with the voucher, showing calls from Tampa on September 28 - 30.

Recapping the travel voucher exhibits, there appear to be errors on October 21 and 26, 1979; July 1, 1982; and May 1, 1983; and September 30, 1983, not bad for some 350 total vouchers submitted. (38)

The second accusation by the Bar was that Respondent "knowingly authorized Anita Lee Taylor to purchase gasoline for her personal use through the use of credit accounts for the Public Defender's office." The Bar offered its Exhibit 11 (211) to prove this allegation. Exhibit 11 contains documents showing that Taylor's tag number is RDY625. (211-218) It also contains copies of numerous charge slips showing license number RDY625. (219-243) All, without dispute, were signed by respondent. His undisputed testimony was that he had both personal and business accounts at

Sugarloaf Texaco where most of the charges were made. (244) He authorized Ms. Taylor, then his fiancee, to charge gas to his personal account. (245) She was not authorized to charge gas to the public defender. (245) The public defender's office had a limited number of cars with which to work the length of Monroe County. Respondent would allow investigators or attorneys to use his car for investigations or hearings, and he would then use Taylor's car. When he did so, he would replace gas consumed. (250) Respondent acknowledged, when questioned by the referee, that "potentially" respondent might not have used for business all the gas he put in Taylor's car on those occasions, so that there "was a possibility" she might have personally benefitted. There was no evidence presented to prove the allegation that Taylor purchased gas on the Public Defender's account. In her deposition Taylor said she was authorized to buy gas at Sugarloaf Texaco "on Mr. Keane's account," which is quite correct if she was referring to his personal account. (252) The Bar beefed this up at the grievance hearing with an affidavit saying "Mr. Keane advised me to place gasoline in my private vehicle, using his State credit card." (253) The draftsman of that affidavit forgot that the Sugarloaf Texaco gas slips are not credit card imprinted slips. (211, 244). There was no evidence that Taylor ever used a state or public defender credit card, or that she

actually signed for or purchased any gas charged to the public defender account.

The next finding by the referee (32) is that respondent allowed Taylor to use a state owned stereo amplifier, tape deck and speakers September 10, 1979, and March 26, 1984, contrary to F.S. 812.014, the "theft" statute. Bar exhibit 12 (256) shows that the equipment was purchased on November 9, 1979. Respondent's undisputed purpose for the purchase was to provide office background music and telephone hold music.* When the Public Defender's Office converted to a new telephone system it was not able to use the stereo. (264) It was loaned to Taylor, a professional hypnotist who conducted seminars and private consultation in tension relaxation, to make tension relaxation tapes for use by public defender personnel. (264-265). Respondent requested the return of the equipment on a number of occasions after the loan. Taylor promised to return it, but never did. This occurred after the personal relationship between respondent and Taylor had ended. (265-266). Taylor's deposition testimony disclaims recollection of these events, except that she recalled being loaned the machine to make tapes, but she did not controvert respondent's testimony. (267-268)

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*This sounds like an unnecessary use of public funds, but the undersigned called The Florida Bar recently and noticed that The Bar also enjoys that amenity.

The next finding (32), is that in December, 1981, respondent sold furniture to the Public Defender's office at an inflated value. From 1974-1979, the furniture was owned by Abacus Investments, Inc., a corporation formed by respondent for his former mother-in-law. Respondent became owner of the corporation at the time of his divorce in 1979. Originally all of the furniture for the Key West, Marathon and Plantation offices of the Monroe County Public Defender was leased from Abacus. In 1979, the auditor general advised that the rental was too high and suggested that the furniture be purchased rather than leased. The lease was cancelled and the Public Defender had free use of the furniture until it was purchased when funds became available in late 1981. The furniture was sold through a "straw man" for $7,297*, of which respondent received $6,797 by check payable to Anita Taylor. Respondent explained that he followed this circuitous procedure because he had experienced difficulty obtaining approval for a purchase of furniture from an assistant public defender, even though he had sole source authority. (209, 269-277)

The owner of Pete's Office Products in Monroe County estimated that the value of the Abacus furniture was between $6,000 and $7,000. (278) The Bar introduced the statement

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*Paid from a Federal Cuban-Haitian grant which was not earmarked for any particular purpose. (272)

of a Dade County furniture purchaser that "Based on our practices, we would have offered no more than...$423 to a company offering us the used furniture." Just what Dade County "practices" are was not explained. (279)

This event was the basis of the charge to which respondent entered his Alford plea. He acknowledges that it was an ethically improper transaction for which discipline was appropriate. However, he disputes the Bar's evidence of value and the contention that he was paid more than the value of the furniture. (342)

Paragraph 13 of the referee's findings states that respondent unlawfully used Public Defender funds to pay his personal car insurance premium. As Public Defender of the 16th Circuit, respondent was authorized by F.S. 27.54 to enter into an automobile lease agreement on behalf of the state. (280). Respondent owned a Datsun "Z" automobile which he had found suitable for his extensive travel requirements, in part because the lumbar seat support alleviated pain resulting from lower back injuries. He signed a lease for a 1980 Datsun 280ZX with Yarbrough Oldsmobile Cadillac, Inc., of St. Augustine. He paid the dealer $3,300 from his personal funds to insure that the monthly lease cost to the State would be more economical than the replaced car lease. The insurance agent providing coverage billed a $504 premium for six months coverage.

(328) Before this was paid, the leasing of this model car was questioned by the Auditor General's Office. Respondent furnished additional information as requested, but on December 23, the Office of the Comptroller advised respondent that the 280Z was not a "reasonable class automobile" to be leased by the state. The Comptroller did not comment on respondent's payment made to reduce lease payments to those applicable to a reasonable class automobile. The lease was not declared to be void ab initio. (All of the foregoing information, except as noted, is founded in Bar Exhibit 14, 281).

Respondent was advised that he could appeal the Comptroller's decision under the Administrative Procedures Act, but decided against it. This sequence of events consumed a little over six months from the leasing of the Datsun before it was determined that the public defender would not continue to lease the car. (327) Ultimately public defender funds were used to pay for the first six months premium because the car was, in fact, under lease to the Public Defender's Office for that approximate period of time. (328) In the course of attempting to satisfy Comptroller objections to the lease, respondent had offered to pay for the insurance from his personal funds, but that contemplated continuation of the lease. (329)

The 14th paragraph of the referee's findings says

first that respondent authorized the public defender's office to purchase a camera from Anita Taylor. This is true, and is documented by Bar exhibit 15. (333) The Bar does not suggest, nor did the referee find, any impropriety regarding that transaction. In fact, Bar counsel agreed that the public defender got "a good camera for a fair price." The referee's report adds: "These sale proceeds were used to purchase the stereo system that was misappropriated in paragraph 11 (sic). This was an ethical violation of the disciplinary rules." The Bar's only evidence on the point was Ms. Taylor's deposition testimony. (351-356) Her testimony and the finding ignore the fact that the cost of the stereo was $648 (256). Respondent denied that the sale proceeds were returned for any purpose. (330) The Bar offered no documents showing that the $250 paid for the camera found its way back into the Public Defender's accounts, or that it was part of the $648 paid for the stereo.

As to paragraph 15 of the referee's findings, respondent purchased a belt sander for the public defender's office to accomplish work the landlord would not perform. He borrowed it for less than a week to do some sanding at home. While it was being used at home, the auditor was taking inventory and asked where it was. Respondent brought it to the office so the auditor could check the serial number, and

put it in a closet where it remained when respondent was suspended from office. (349-350)

ARGUMENT ON APPEAL BY THE FLORIDA BAR

Summary of Argument

The Bar's argument that respondent should be disbarred relies upon findings which are not supported by clear and convincing evidence. There are only five clear examples of gas credit card slips contradicting travel voucher dates on 350 vouchers spanning five years; these were as likely produced by date errors as by falsification, and the referee could not ascertain that the State actually lost money. There was no evidence that Anita Taylor charged gas to the public defender account as alleged. The loan of the stereo and borrowing the belt sander did not constitute theft as alleged. Sale of furniture to the public defender was extremely poor judgment, but there was no clear and convincing evidence of any loss to the State.

Decisions cited by the Bar for disbarment involve clear instances of conversion or embezzlement of large sums of money and are clearly distinguishable from the case sub judice.

The extreme sanction of disbarment is to be imposed only in those rare cases where rehabilitation is highly improbable.

Respondent's disagreement with his suspension, with referee findings, and with Bar actions are reasonable and do not evidence malice or ill will.

<u>Argument</u>

The Bar's statement of issues presented on this appeal is stated as follows:

WHETHER A TWO AND ONE HALF YEAR SUSPENSION IS AN APPROPRIATE DISCIPLINE WHERE A PUBLIC OFFICIAL KNOWINGLY AND UNLAWFULLY MISAPPROPRIATES PROPERTY OF THE STATE OF FLORIDA FOR HIS PERSONAL USE.

This statement of the issue presented would be more accurate, assuming there was clear and convincing evidence of unlawful misappropriation of state property, if it included the fact that pursuant to a plea bargain in November, 1984, respondent voluntarily suspended his practice on January 4, 1985, and has been suspended by order of this Court since March 4, 1985. The referee recommended a 2 1/2 year suspension effective October 19, 1987. (33) If approved by the Court in that form, the total official suspension, beginning March 4, 1985, disregarding two months voluntary suspension, would run to April 19, 1990, exceeding five years.

The Bar refers to various findings by the referee as substantial grounds for disbarment.

First are the multiple findings that respondent falsely obtained reimbursements for travel expenses by submitting travel vouchers for expenses while traveling for

personal reasons. Careful review of the Bar exhibit reveals that if service station attendants did not forget to change the date on credit card impression machines, and if there was no mistake on vouchers frequently prepared weeks after the fact, there are only five clear examples of gas credit card slips dates contradicting voucher dates. These were on October 21 and October 26, 1979, July 1, 1982, May 1, 1983, and September 30, 1983, for a total of $205.00. The referee stated, when announcing his findings with respect to the travel voucher allegations:

> "This is a little strange because I am not entirely certain that the Bar could prove Mr. Keane may have spent State money in excess of what he would have been entitled to." (337)
>
> * * *
>
> "-- the Bar's position is that that cost the State a lot of money. This Court's position, as a referee, is that I really can't ascertain to what degree it actually costs the State." (338)
>
> * * *
>
> "It may or may not have cost the State money." (338)

If the referee could not ascertain whether respondent's allegedly conflicting vouchers cost the State money, the record is devoid of evidence that respondent "Knowingly and unlawfully misappropriated property of the State of Florida."

Between 1979 and 1984, respondent filed approximate-

ly 350 travel vouchers. (38) The Bar has presumably screened them all but can prove only five incidents when gas slip dates conflict with per diem charges, and most of those depend on an assumption that the credit card slip dates are correct. (38) This is not clear and convincing evidence of an ethical violation.

Second, the Bar says "The referee found Mr. Keane unlawfully and knowingly authorized Anita Taylor to purchase gasoline for her personal use through the use of credit cards issued to the public defender's office." Actually, the referee said "through the use of credit accounts for the Public Defender's office." At any rate, as has been shown in respondent's fact statement, the only documentation on this point (Bar Exhibit 11, 211) shows that respondent put gas in Taylor's car, charging to a public defender's account, when he borrowed her car for use on public defender business. The Bar did not dispute this. There is not one shred of credible evidence that Taylor ever purchased so much as a pint of gasoline on the public defender's account. As noted by the referee at the trial, there is only a <u>possibility</u> that Taylor <u>might</u> have benefitted from respondent's purchases if the gas he put in her car exceeded the amount he had used on official business; but the Bar offered no proof that such possibility occurred. Again, there is no evidence that respondent knowingly and unlawfully misappropriated anything.

Third, the Bar refers to respondent borrowing the belt sander and allowing Taylor to use the stereo. Respondent's explanation that the public defender's original purpose for the stereo had been frustrated, that there was an official purpose for loaning the stereo to Taylor, went unchallenged. Charging a public defender with theft because he briefly borrowed his office's belt sander for personal use is scraping the bottom of the barrel in search of accusations. There was absolutely no evidence of an intent to deprive the public defender's office of its "right to the property or a benefit therefrom." F.S. 812.014(1)(a). It is understandable that the State decided not to prosecute such charges.

Next, the Bar refers to the office furniture incident.* This incident represented extremely poor judgment at best. Of all the alleged "thefts," this is the only charge pursued by the State Attorney. The Bar implies that respondent gained pecuniarily at the State's expense. There was conflicting opinion evidence on this point, with the local dealer's affidavit supporting the price paid for the furniture. At page 5, line 24, of the September 15, 1987, transcript, the referee said with respect to the furniture transaction: "The State may or may not have lost a fair

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*The Bar alleged that respondent sold furniture <u>of</u> the public defender. The referee found that he sold furniture <u>to</u> the public defender.

amount of money on this deal. There are different estimates as to how much that furniture is worth. It seems to have been an overestimate as to the amount of money that the Public Defender's office bought this used furniture for...."* There was no determination whether the state did actually lose money, only an observation that it may have. Without such an adjudication, there could not have been a conviction of theft. (See F.S. 812.014(2)(a)-(d)).

In a disciplinary case in which the referee issued a finding of forgery where the opinion of experts was divided, this Court held that the finding was not supported by clear and convincing proof and that the Bar failed to sustain its burden of proof. The Florida Bar v. Schonbrun, 257 So.2d 6 (Fla. 1971).

The Bar argued, based upon these incidents, that "in a situation such as the one now before the Court, involving numerous instances of theft over a long period of time, the proper discipline is disbarment." (emphasis added) (p. 9 of Petitioner's brief)

Theft is defined by Sec. 812.014. The property obtained or used must have some value, and there must be an intent to deprive the owner of a right to the property or benefit thereform. There is no evidence sufficient to prove

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*When Bar counsel prepared the report of referee, the words "seems to have been an overestimate" were transformed to "appeared to be at an inflated and false value."

theft with respect to the travel vouchers, the purchase of gas for Taylor's car, loaning the stereo for an official purpose, or borrowing the sander.* As to these items, the referee could not say that the state had lost a dime. The most he could say with respect to the furniture, before Bar counsel waxed poetic when drafting the written findings, was the amount paid "seems to have been an overestimate." That does not sound like a finding based upon clear and convincing evidence. Taking a position most favorable to the Bar, respondent might have been paid some unknown amount exceeding the actual value of the furniture. If so, there was one incident of misappropriation out of sixteen charged, and the proof of a loss was not clear and convincing. There certainly was no proof of "numerous incidents of theft over a long period of time."

The Bar's authorities for disbarment as a punishment for respondent tend to favor respondent rather than the Bar.

In The Florida Bar v. Bunch, 195 So.2d 558 (Fla. 1967), the attorney converted $55,000 while serving as Clerk of the Circuit Court for Broward County, and another $4,500 as secretary-treasurer of the Broward County Bar Association. The unsavory appearance of the misguided act of selling his

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*The Bar does not mention the car insurance, the alleged purchase of gas by Taylor, or the camera sale in arguing for disbarment, tacitly admitting the lack of evidence supporting these charges.

corporation's furniture to his office through a straw man certainly justifies punishment, even if there is no clear and convincing proof that respondent profitted by the transaction. But respondent's conduct, although it must be condemned, is scarcely comparable with the embezzlement of almost $60,000 in 1967 dollars.

In re LaMotte, 341 So.2d 513 (Fla. 1977), involved this Court's removal from office of a judge who used a state credit card to pay for airline tickets for personal trips. This Court approved the removal as appropriate "extreme discipline" for LaMotte's "serious and grievous wrongs of a clearly unredeeming nature." Respondent has found no record of any subsequent Bar disciplinary proceeding against LaMotte. The Court is reminded that respondent has already suffered the loss of his office as public defender, held for 12 years, by executive suspension from office without a hearing, followed by interim suspension from law practice by this Court since March, 1985. The Bar's argument that LaMotte's removal from judicial office is the equivalent of and precedent for disbarment of respondent is not well founded in logic or common sense. It is strong authority for a counter argument that suspension for five years, much less disbarment, is excessive punishment.

The Bar inappropriately cites The Florida Bar v. Nagel, 440 So.2d 1287 (Fla. 1983), where the lawyer had

repeatedly converted his client's funds to his personal use.

The Bar incorrectly cites The Florida Bar v. Atkins, 218 So.2d 748 (Fla. 1969). Atkins v. State of Florida, a per curiam denial of certiorari in a criminal case is found at that citation. The Bar must have intended to cite The Florida Bar v. Burton, which begins on the same page. Burton was found guilty in 1968 of misappropriating $26,000 in client trust money.

The Bar also cites The Florida Bar v. Vallecorsa, 209 So.2d 452 (Fla. 1968), where the disbarred lawyer embezzled $45,000 from a client's trust fund; The Florida Bar v. Rhodes, 355 So.2d 774 (Fla. 1978), where the lawyer converted almost $20,000 from an estate he was handling; and The Florida Bar v. Jessie James Wolbert, 446 So.2d 1071 (Fla. 1984), where the lawyer converted an unspecified amount of trust funds and abandoned the practice of law.

In answer to the authorities cited by The Bar as authority for disbarment, respondent suggests that the lawyer's conduct was far more serious in The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988), than in the case sub judice. Mr. Hartman received $2,500 from a client's husband to pay child support but did not deposit it in trust or inform the client. Seven times he received costs advanced by putative fathers for blood tests but the money disappeared. An audit showed a $9,703.91 shortage. He failed to disburse

to his client the $7,000 proceeds of a real estate deal. He took $3,543 from a client to pay the client's debts, failed to pay the debts, and kept $491.83 without an accounting. He represented both parties to a usurious transaction, and failed to disclose the conflict or advise them that the note was unenforceable and a felony. Finding that the "extreme sanction of disbarment is to be imposed only in those rare cases where rehabilitation is highly improbable," this Court suspended Mr. Hartman for two years.

Respondent also asks the Court to recall The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984). This Court sustained findings that Lancaster pleaded nolo contendere to misdemeanors of altering the identification number on a boat and possessing a boat with an altered identification number, that he schemed to influence a witness not to appear at trial, that he attempted to induce another witness to testify falsely, and that he lied under oath to a state attorney about his involvement in the boat incidents. The Florida Bar recommended a one year suspension and the referee recommended disbarment. This Court (with Justices Alderman and Ehrlich dissenting and favoring disbarment) suspended Lancaster for two years. The Court said, after acknowledging that there were questions about Lancaster's fitness to practice law:

> "However, because of his previous untarnished record and his involvement in community affairs and charitable efforts, we decline to hold that Lancaster's conduct

warrants disbarment."

Respondent, who rendered heroic service as a Korean War Navy pilot, practiced with an unblemished record for 24 years, served for 12 years as public defender, and devoted enormous quantities of time and energy to professional service activities, has provided numerous affidavits* showing the respect and esteem with which he is viewed in his community. (359-364) Bar counsel's correspondence twice acknowledged fruitless continued efforts to develop a negative case with respect to respondent's character. (365-367) If respondent is punished more severely than Gregory Hartman or Alex Lancaster, then the disciplinary system is not being uniformly or fairly administered.

The Bar contends that respondent "used the public's trust and confidence to steal from the citizens of the State of Florida." That accusation was reckless and improper because the Bar could not and did not tell the Court what is the dollar amount or value that respondent allegedly stole.

The Bar's argument that respondent "committed similar misconduct numerous times over a period of approximately six years" was also a mistatement of the facts in evidence as has been shown.

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*e.g., Chief Circuit Judge of Sixteenth Circuit, County Attorney for Monroe County, State Representative from Monroe County, Sheriff of Monroe County, Attorney and owner of Sugarloaf Lodge, Executive Vice President of Marine Bank of Monroe County, and numerous others.

Bar counsel, whose associate incorrectly insisted to the referee that respondent has suffered a "felony suspension" (340), argues to this Court that a conviction of grand larceny justifies disbarment of respondent. There was no conviction or adjudication of guilt. Respondent has every right to claim the benefit of that circumstance, and it is highly improper for Bar counsel to contend that respondent was convicted when for presumably valid reasons adjudication was withheld.

The Bar directs the Court's attention to "Florida Standards For Imposing Lawyer Sanctions." Respondent is informed that the "Standards" have not been adopted by the Court and so are not a controlling authority. The Bar would have the Court apply a standard which states that disbarment is appropriate for a lawyer in a governmental position who "knowingly misuses the position with the intent to obtain a <u>significant</u> benefit or advantage ... or ... to cause <u>serious or potentially serious</u> injury...." (emphasis added) The Bar failed to prove significant benefit or advantage to respondent, or serious or potentially serious injury to the state.

Standard 5.22 is far more applicable, if the Standards are to be applied. It provides that "Suspension is appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedure or rules,

and causes injury or potential injury...." Even then, only in the case of the furniture sale was there any evidence of possible injury, and it was not clearly and convincingly proved.

Finally, the Bar accuses respondent of refusing to admit his conduct was unethical, of rationalizing his actions as ethical, "even though they are clearly violations of both the criminal code and the Rules of Professional Conduct." This indicates to the Bar that respondent's attitude shows contempt for both the criminal process and the disciplinary process.

Respondent has consistently taken exception to accusations of criminality and to certain aspects of the referee's findings, and has no reservation about expressing those exceptions before this Court, backing them up with concrete evidence. It simply is not true, though, to suggest that respondent has not admitted misconduct and the appearance of misconduct. Respondent told the referee:

> "I apologize tremendously to the Court, to the Bar, to the entire profession in Florida for any judgment or error that I have made, ..." (345)
>
> "I am truly sorry for all the plague upon the house that I have brought to the Bar and to the Court and to the profession that I feel very strongly about."
>
> "I think that even if my judgment calls -- if I thought they were right, they are obviously wrong or it would not have stirred up so much." (346)

> "I have been publicly humiliated and embarrassed, and I am ashamed of the situation that I find myself in, as I said, both for myself and for its reflection upon the profession in this state."
>
> * * *
>
> "I probably would recommend a three year suspension as if I had been convicted of a felony count, even though I have not, ..." (347)

Respondent was prepared to admit that the sale of furniture to the public defender's office "was certainly an impropriety," but he understandably felt that the belt sander incident was "a tempest in a teapot" (343), and that "it is irresponsible on the part of the Florida Bar to act like I am a felonious thug in taking a belt sander home." (344) He has correctly insisted in the face of Bar charges and referee findings that there is not a shred of evidence that Ms. Taylor ever charged her gas to the public defender (341), or that the State paid for insurance on the 280Z except while the car was legitimately leased to the State.

Does the Bar propose that a lawyer charged with misconduct should meekly acquiesce in Bar accusations, that the Bar and the referee cannot err, that the fallible humans who act for the Bar are incapable of occasional subjective pettiness and vindictiveness?

This Court recently took exception to such a view in <u>The Florida Bar, In Re Louis Vernell, Jr.,</u> 520 So.2d 564

(Fla. 1988). Vernell sought rehabilitation, and the Bar argued that he had demonstrated malice and ill feelings towards those who prosecuted him. This was based upon Vernell's statements "at the reinstatement hearing that he believed this Court's decision to suspend him for 91 days was legally incorrect." Holding that disagreement with a discipline ruling is no basis for denying reinstatement, this Court said:

> "Disagreement with a legal holding, in and of itself, is not evidence of malice. It is not uncommon that reasonable people disagree as to how a court disposes of a case without evidencing malice or ill-will towards the court. Frequently such disagreement arises within the court itself."

In conclusion, respondent cites The Florida Bar v. Felder, 425 So.2d 529 (Fla. 1982), where the lawyer had improperly used estate and trust funds over a period of twelve years. The referee recommended suspension and the Bar petitioned for review. This Court adopted the referee's recommendation holding that "Disbarment is an extreme penalty and should only be imposed in those rare cases where rehabilitation is highly improbable."

CROSS APPEAL

Summary of Argument

I.

THE REFEREE'S FACT FINDINGS AND RECOMMENDATIONS WHETHER RESPONDENT SHOULD BE FOUND GUILTY ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

Various factors caused the referee's erroneous verbatim adoption as findings of the Bar's allegations of misconduct. Indigent and in poor health, suspended from practice, respondent could not retain competent legal representation. Venue of grievance proceedings was improperly moved 500 miles to Alachua County, and respondent could not appear or send counsel. His third lawyer stipulated the ex parte testimony, replete with conclusions and opinions, into evidence before the referee. There was an eight month delay from referee hearing to publication of findings. Written findings were drafted and prepared by Bar counsel, not by the referee. Long, inexplicable delays throughout the proceedings raised serious questions about overall fairness and prejudiced respondent's ability to defend himself.

There was no clear and convincing proof, proof producing a firm belief or conviction, supporting findings of theft.

Assuming gas slips and voucher items were accurately dated, there were five questionable per diem charges in 350 travel vouchers submitted over five years, and no evidence

that the State lost money.

Documentary evidence affirmatively showed that Anita Taylor never charged gas to the public defender account.

Lending a stereo to Anita Taylor appeared improper, but there was undisputed evidence of a proper purpose and no clear and convincing evidence of theft.

The automobile insurance premium was properly paid by the State covering the period respondent's automobile was leased by the State.

There was no impropriety shown with respect to purchase of a camera from Anita Taylor.

Borrowing a belt sander was not precisely proper but the accusation of theft is petty and unproven.

The furniture transaction was a clear lapse of judgment which had the appearance of criminality and was a punishable ethical breach, but there was no clear and convincing proof of theft.

Findings 1 through 10, 13, 14 and 15 should be reversed for lack of clear and convincing evidence; the findings of theft with respect to the stereo loan (finding 11) and the furniture transaction (finding 12) should be reversed; the findings that the stereo loan and furniture transaction were acts contrary to Disciplinary Rule 1-102(A)(6) should be sustained.

II.

THE REFEREE'S RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE IMPOSED IS EXCESSIVE, AND IS CONTRARY TO ESTABLISHED PRECEDENT.

Even if the Court approves findings of dishonesty, fraud, deceit or misrepresentation with respect to the furniture transaction, by comparison with other disciplinary decisions imposing suspensions equivalent or more serious offenses, the penalty imposed should not exceed the three year suspension already served.

CROSS APPEAL

I.

THE REFEREE'S FACT FINDINGS AND RECOMMENDATIONS WHETHER RESPONDENT SHOULD BE FOUND GUILTY ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The referee's findings are largely verbatim copies of The Bar's voluminous allegations of misconduct. How could this occur without clear and convincing evidence to substantiate each of the eighteen points?

There are a number of factors present in this case which may have produced such a result.

First, was Respondent's difficulty, due to his indigence stemming from his suspension from office and the practice of law, in obtaining effective legal representation. Even a lawyer experienced at defending others urgently needs a good lawyer when his reputation, career, and freedom are at stake. Emotions and subjectivity block the mental processes. There is much truth in the old saying that "He who represents himself has a fool for a client."

Three lawyers appeared serially for respondent. The first, after ignoring the Bar's petition for suspension and failing to competently resist a prejudicial change of venue, did not appear at the grievance committee hearing conducted in Gainesville because respondent could not pay him. The second filed one motion and discovered a "conflict of interest" when it was denied. The third shockingly

stipulated into evidence before the referee all of The Bar's evidence and ex parte testimony, although it was submitted to the grievance committee riddled with self-serving opinions and conclusions. The transcript of the referee hearing discloses no in depth analysis of Bar exhibits, such as the detailed comparison of travel vouchers and credit card slips attempted in this brief. When the erroneous findings were published and later reviewed, respondent appeared pro se, and his efforts to point out discrepancies between the evidence and specific findings were ineffective. (Transcript 9/15/87)

Second, the long delay between the evidentiary hearing in January, 1987, and a decision in September, 1987, could well be a factor. This was not entirely the referee's fault by any means. Judge Gerstein apologized for the delay, observing that he waited for a transcript, and then for affidavits, and then for written arguments, and then "was in trial almost perpetually for the last two or three months;" but delay must have contributed because some of the findings simply have no similarity even to The Bar's evidentiary position.*

Finally, The Bar's counsel drafted the findings after they were verbally announced. Judge Gerstein's

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*e.g., "Respondent...authorized Anita Lee Taylor to purchase gasoline [charged to the Public Defender]," but the Bar's evidence only showed that respondent himself occasionally put gas in Taylor's car, which he plausibly explained without dispute.

frequently repeated observations of uncertainty (e.g., "It may or may not have cost the State money,") became "it is impossible to determine the exact loss of funds," suggesting that funds indeed were lost. In each instance there is a recitation that respondent was guilty of theft, notwithstanding the lack of evidence that respondent deprived the State of a thin dime. Another striking example is The Bar's doctored version of Judge Gerstein's finding that paying for the insurance on the leased car was not lawful because the Cuban Haitian account used "was for a specific purpose." (338A, 338B)* The Bar translated this into "Respondent...unlawfully...used Public Defender office funds to pay for his personal car insurance in violation of F.S. 812.014." The verbal findings do not suggest that State money was used for a personal insurance obligation, and the evidence clearly shows that the car was legally leased to the State during the relevant period.

In addition to the effect of these circumstances on the findings, needlessly keeping respondent in poverty during the long and unnecessary delays (e.g., eleven months between grievance committee probable cause findings and Bar complaint), and illegally moving the committee session a great distance from his residence, raise extremely serious

*There was no evidence that the Cuban-Haitian funds were earmarked for a particular purpose.

questions about the overall fairness of the proceedings. This Court has held that disciplinary proceedings should be handled with dispatch and without undue delay, recognizing that inordinate delays are unfair, unjust, and often prejudicial to the accused attorney." The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978). See also, Murrell v. The Florida Bar, 122 So.2d 169 (Fla. 1960), requiring that disciplinary cases be prosecuted as promptly as the ends of justice will permit; and The Florida Bar v. Thomson, 429 So.2d 2 (Fla. 1983), criticizing long and inexpicable delays in disposing of the disciplinary proceedings. This Court has frequently spoken of the general requirement for fairness to the accused attorney in disciplinary proceedings. See, e.g., The Florida Bar v. Bass, 106 So.2d 77 (Fla. 1958); The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978); and The Florida Bar v. Carter, 429 So.2d 3 (Fla. 1983).

Referring to specific findings, respondent contends that the referee's written findings numbered 1 through 15 are either incorrect or in several instances seriously overstated. While the referee's factual findings are entitled to a presumption of correctness, the problem in this case is the absence of clear and convincing proof. This Court has repeatedly held that in disciplinary proceedings a referee's report must be supported by competent and substantial evidence which clearly and convincingly shows

violations. The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978); The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970); The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973); The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984). Black's Law Dictionary, Fifth Edition, West Publishing Company, p. 227, defines clear and convincing evidence as "That measure or degree of proof which will produce in mind of trier of facts a firm belief or conviction...."

That quote immediately brings to mind the referee's frequent equivocal remarks as to the quantum of proof. (see page 24) The evidence did not produce in the mind of the referee a firm belief that respondent was guilty of theft.

> "What I was saying, however, was that there is a question in the Court's mind that on a lot of those counts, I am not sure that the Bar could actually prove grand theft because it is hard to ascertain what money, if any, in some of those, that Mr. Keane may have gotten unlawfully, and that the State would have lost."

As has already been discussed at some length, there are only five clear conflicts between gas slips and travel vouchers, and even those are not convincing evidence of misconduct in recovering per diem because they rely entirely upon the accuracy of the gas slip dates. So much for findings 1 through 9.

Finding number 10, in addition to lack of evidence of loss to the State, entirely contradicts The Bar's evidence. The documentary evidence affirmatively shows that Anita Taylor never charged gas to the public defender account as alleged and found.

Finding number 13 (car insurance) is contrary to the referee's verbal finding, and even the verbal finding was mistaken. The evidence already discussed clearly showed that respondent could legally lease the car, that the lease was criticized long after the fact due to the type of car, that the insurance premium paid by the State covered the six months that the lease was in effect.

Finding number 14 says respondent authorized the Public Defender's Office to buy a camera from Taylor. Nobody questions either his authority to do so or the price paid. The finding then says "The sale proceeds were used to purchase the stereo system." There was no evidence of such transaction. Taylor's testimony on the camera transaction does not make sense. Why would she sell a camera and then return the money to the purchaser? If she did so, why was it improper for the buyer then to use that money, with other funds, to purchase a stereo from someone else? If it was improper, where is the evidence that the camera proceeds went back into the Public Defender's checking account, or that the proceeds were actually part of the money paid for the stereo?

Is it possible that Taylor's confused testimony, the Bar's primary testimony against respondent, could be an example of that variety of fury not found in Hell?

This leaves findings number 11, loaning the stereo system, number 15, borrowing the belt sander, and 12, selling the furniture through a straw man.

There was an undisputed explanation regarding the stereo, that Taylor was to produce tapes for use in the Public Defender's Office. But Taylor was respondent's fiancee, and this transaction does not have the appearance of propriety one should expect of a lawyer in public office. It is properly criticized, and would justify a reprimand, but there is no clear and convincing evidence of theft.

The belt sander accusation and finding indicates the degree of zealous prosecution which has been directed toward respondent. To be precisely, rigidly, proper, he should not have borrowed it, but it is such a petty accusation! There is no evidence of intent to deprive the State of anything of value.

This leaves the furniture transaction. That was dead wrong! It was a clear lapse of judgment which has the appearance of ethical breach and criminality. Suspension from an office honorably held for 12 years was a harsh remedy, but one cannot legitimately quarrel with the Governor's right to take that action. But the referee, in

proceedings with a lesser burden of proof than for criminal prosecution, could only say that the price appeared to have been inflated. And the State Attorney chose to bargain away his threat to serially prosecute respondent on sixteen separate counts in return for an Alford plea on this single charge, followed by probation without adjudication of guilt. As previously noted the doubtful proposition that the State lost or respondent gained was an issue between two expert opinions, not clear and convincing proof, and the referee was only willing to say that the price seemed inflated without determining an amount. The Bar's witness did not actually express a value opinion, only what she would have offered under an undefined Dade County purchasing procedure.

In considering the weight of evidence supporting the Bar's contention that respondent is a thief, the Court is requested to consider paragraph 6 of the Affidavit of Professor Gerald T. Bennett, University of Florida College of Law. (114) Professor Bennett, who served with respondent on the Executive Council of the Criminal Law Section, noted that during the years respondent was a lobbyist for the Criminal Law Section, only $213.34 of $6,650 allocated for legislative lobbying purposes was spent on lobbying. (Relevant budget records are attached to his affidavit.)

If John Keane, the lobbyist with access to those funds, were a thief who preyed upon expense accounts, he

certainly missed an opportunity to steal a substantial part of this unused money.

It is respectfully proposed that findings 1 through 10, 13, 14 and 15, be reversed for lack of clear and convincing evidence; that so much of finding number 11 (stereo loaned) and 12 (furniture sale) as refer to violation of F.S. 812.014* and using the expression "unlawful" be reversed. This would leave intact the finding that loaning the stereo to Ms. Taylor and selling the furniture to the Public Defender's Office were acts contrary to Disciplinary Rule 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law).

II.

THE REFEREE'S RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE IMPOSED IS EXCESSIVE, AND IS CONTRARY TO ESTABLISHED PRECEDENT.

Even if this Court finds a violation of DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misreprsentation) with respect to the furniture sale, the penalty should be substantially less than the five year suspension imposed by adding 2 1/2 years to the temporary suspension.

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*There is a typographical error in finding number 12. It refers to F.S. 12.014, when F.S. 812.014 must have been intended.

As precedent for this contention, respondent cites The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), where the lawyer had been convicted of willful failure to file income tax returns from 1954 to 1976, and willful failure to pay taxes on $545,000 from 1973 to 1976. The referee recommended three month's suspension. A 4-3 majority decided to suspend for six months. Justice Alderman dissented, proposing a three year suspension. Justices McDonald and Ehrlich favored disbarment. The referee and the majority of this Court depended for mitigation upon a number of factors, many of which appear in the case sub judice. For example: The lawyer's age, years of service to clients, community, the Bar, and his country; testimony of Bar and community leaders; not found guilty of a felony, and the criminal trial judge was satisfied with 81 days in a minimum security facility and three years probation (Keane was not sentenced to jail); personal hardships, including loss of standing in the Bar and community, loss of professional esteem, acute personal embarrassment; the extent to which a longer suspension would injure the lawyer economically; and his unblemished record exclusive of the tax charges.

That respondent has been rehabilitated is evidenced by numerous affidavits provided to the referee, but in particular respondent points to the affidavit of Honorable David P. Kirwan, Chief Circuit Judge in the Sixteenth

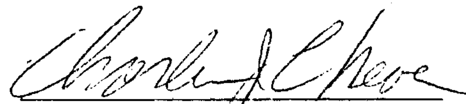
Circuit, who said:

> "To my knowledge there will no legal or ethical impediment to John Keane appearing in Circuit Court in the event he is reinstated as a member in good standing of the Florida Bar."

Respondent has been officially suspended by order of this Court for more than three years. The suspension already served, considered in context with the loss of public office, the severe financial hardship suffered, and evidence of rehabilitation, has been more than ample punishment.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished, by mail, to John A. Boggs, Director of Lawyer Regulation, The Florida Bar, Tallahassee, Florida 32301 this 5th day of May, 1988.



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