STATEMENT OF THE ISSUES

I. WHETHER THE REFEREE VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY PREVENTING HIM FROM EXPLAINING THE MITIGATING FACTS AND CIRCUMSTANCES UNDERLYING HIS FELONY CONVICTION FOR OBSTRUCTION OF JUSTICE?

II. WHETHER THE REFEREE'S RECOMMENDATION OF DISBARMENT WAS EXCESSIVE DUE TO THE UNIQUE NATURE OF THE CRIME OF CONVICTION, THE EXTENSIVE EVIDENCE OF OTHER MITIGATING FACTORS, THE BAR'S CONCESSION THAT PETITIONER "IS A PERSON OF GOOD MORAL CHARACTER" AND THE REFEREE'S OWN FINDING THAT THE PETITIONER "HAS THE ABILITY TO BE REHABILITATED"?

STATEMENT OF THE CASE[1/]

On April 10, 1991, alleged drug traffickers Salvador Magluta and Augusto Falcon were indicted by the federal grand jury in the Southern District of Florida in *United States v. Salvador Magluta, et al.,* Case No. 91-6060-Cr-Moreno (S.D. Fla.). *See* Amended Complaint, Exhibit A. Approximately one month later, on

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

May 16, 1991, the federal judge assigned to the case, the Honorable Frederico Moreno, entered a protective order, enjoining both the indicted defendants and their "agents, ... attorneys ... and those persons in active concert and participation with them" from receiving any assets owned by the indicted defendants. *Id.*

The Petitioner, RICHARD I. MARTINEZ, was one of a team of attorneys retained to represent Magluta and Falcon. *See* p. 7 *infra*. Over the course of a five year period, 1991-1996, Petitioner received substantial legal fees for the representation.

On July 14, 2000, Petitioner entered a guilty plea to a single count of obstruction of justice under 18 U.S.C. § 1503 in *United States v. Richard Martinez*, Case No. 99-583-Cr-Seitz (S.D. Fla.).[2/] The Information alleged that Petitioner's receipt of fees obstructed justice in that it violated the restraining order in the *Magluta-Falcon* case. On the same day his plea was entered, July 14, 2000, Petitioner was adjudicated guilty in a hearing before the Honorable Patricia A. Seitz and was sentenced to serve a term of six (6) months in a prison camp followed by six months of home detention.[3/]

[2/] Copies of the criminal Information and related documents were attached to the Bar's initial and amended Complaints and the Bar's Amended Motion For Partial Summary Judgment in this case.

[3/] A copy of the plea transcript was attached as Exhibit D to the Bar's Amended

(continued...)

On September 18, 2000, this Court suspended Petitioner from the practice of law based on his plea and criminal judgment, pursuant to Rule 3-7.2(e) of the Rules Regulating the Florida Bar. Thereafter, the Florida Bar filed initial and amended Complaints against Petitioner, pursuant to Rule 3-7.2(i)(1) and (2) of the Rules of Discipline, seeking Petitioner's disbarment.

On April 23, 2001, the Florida Bar moved for partial summary judgment, arguing that Petitioner's adjudication conclusively established four violations of the Rules Regulating the Florida Bar: Rule 4-8.4(a) (violating the rules of professional conduct); Rule 4-8.4(b) (the commission of a criminal act); Rule 4-8.4(c) (engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation"); and Rule 4-8.4(d) (engaging in conduct that is "prejudicial to the administration of justice"). The Petitioner agreed in part and opposed in part the Bar's motion.

Petitioner acknowledged that, under Rule 3-7.2(1)(3) of the Rules of Discipline, his felony adjudication constituted conclusive proof of the criminal offense charged and agreed that partial summary judgment could be entered against him concerning three of the four violations listed in the Amended Complaint. However, Petitioner argued the "facts and circumstances behind" his conviction did not support a finding that he necessarily violated Rule 4-8.4(c) and that "due process

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[3/](...continued)
Motion For Partial Summary Judgment in this case.

requires that Respondent `be given full opportunity to explain the circumstances ... surrounding his conviction...." *See* Response To the Bar's Second Amended Motion For Partial Summary Judgment, April 21, 2001, at pp. 1-2, quoting *State ex rel. Florida Bar v. Evans*, 94 So.2d 730, 735 (Fla. 1957). Accordingly, Petitioner sought a hearing before a Referee to establish the full "facts and circumstances" and to offer evidence in mitigation. *Id.* However, on May 9, 2001, the Referee, the Honorable Henry Leyte-Vidal, granted the Bar's motion for partial summary judgment as to all four violations relied upon by the Bar and scheduled a hearing on mitigation for July 6, 2001.

Prior to the mitigation hearing, the Bar moved to exclude the proposed testimony of Petitioner's criminal defense attorney, James Jay Hogan, Esq., and to limit the amount of "character" testimony introduced by Petitioner. *See* The Florida Bar's Motion To Exclude Witnesses, June 20, 2001. The Referee convened a telephonic hearing on the motion on June 28, 2001. During the hearing, Bar counsel indicated that the Bar intended to introduce the entire July 14, 2000, plea transcript containing statements by both the prosecutor and Petitioner concerning the factual basis for the obstruction charge. *See* Transcript, June 28, 2001, at p. 4. Nonetheless, the Bar objected to any additional or explanatory live testimony from Petitioner or his witnesses concerning that subject during the mitigation hearing

itself as "irrelevant." *Id.* at p. 4. The Bar also requested that the Referee restrict the number of character witnesses. The Bar took the position that disbarment was required based solely upon the "judgement and conviction" for a felony. *Id.* at p. 12. Indeed, the Bar represented that "we're not contesting the [Petitioner's] good character." *Id.* After additional argument on the subject, Bar counsel reiterated:

> MS. REYES: Well, ***we're not disputing that [Petitioner] is a good guy and I agree with Mr. Weiss as to that he is a good guy***, but the fact remains that he was convicted of knowingly taking money that was under a protective order.

Id. at p. 15 (emphasis added). The Referee, however, allowed Petitioner to call seven witnesses and to submit additional letters and affidavits concerning his character and community activities.

On July 6, 2001, the Referee conducted the mitigation hearing. *See* Transcript, July 6, 2001. As set forth further below, during the hearing, the Referee sustained Bar counsel's objection to testimony from Petitioner himself concerning the manner in which other attorneys representing Magluta and Falcon were paid and Petitioner's reliance on the conduct of these other attorneys. Transcript, July 6, 2001, at pp. 83-84.

On July 20, 2001, the Referee issued his Report, finding that Petitioner violated all four rules listed in the Amended Complaint. Despite extensive mitiga-

tion testimony and his own finding that Petitioner "has the ability to be rehabilitated," Report, at p. 8, the Referee also recommended that Petitioner be disbarred. In so ruling, the Referee disagreed with the position of Stephen Chaykin, the Designated Reviewer for the Board of Governors of the Florida Bar. Mr. Chaykin recommended that Petitioner only be punished with a three-year suspension. *See* Transcript, July 6, 2001, at p. 103. The Referee relied heavily on Standard 5.11(a), which states that disbarment is appropriate when a member of the Bar is convicted of a felony. *See* Report, at pp. 6, 8.

On August 2, 2001, Petitioner filed a Motion For New Trial and Rehearing due to the Referee's exclusion of evidence. The Motion also included proffers outlining the substance of the excluded testimony of both Petitioner and Mr. Hogan. On August 8, 2001, the Referee summarily denied the motion.

Petitioner timely filed an Amended Petition For Review seeking this Court's review of both the Referee's Report of July 20, 2001, and the Referee's Order of August 8, 2001. The Court has jurisdiction under Art. V, § 15, of the Florida Constitution.

STATEMENT OF THE FACTS

The Bar's Evidence

At the beginning of the hearing on July 6, 2001, the Bar based its request for disbarment exclusively on the documents previously submitted to the Referee in support of its partial motion for summary judgment, *i.e.,* the criminal Information, Petitioner's Judgment and Conviction order, his plea agreement and the July 14, 2000, plea transcript. *See* Transcript July 6, 2001, at pp. 15, 19-20.

During his plea colloquy before Judge Seitz, the prosecutor, Assistant United States Attorney ("AUSA") Michael Patrick Sullivan, described the evidence against Petitioner, emphasizing that Petitioner was married to the sister of Isabel Solis, the ex-wife of Salvador Magluta. Transcript, July 14, 2000, at p. 26. AUSA Sullivan claimed that Petitioner necessarily "would have observed" Magluta's extravagant life style because Petitioner was Magluta's "brother-in-law." *Id.* at pp. 26-27. Therefore, AUSA Sullivan surmised, Petitioner "would have realized at some point prior to 1991" that Magluta had no "legitimate" employment and must have been a drug trafficker. *Id.* at p. 27. *See also id.* at p. 30 (arguing that "a reasonable juror could conclude" that Petitioner "would have had the knowledge that brother-in-law Salvador Magluta was a drug trafficker").

AUSA Sullivan then explained that during the course of defending Magluta and Falcon in *United States v. Salvador Magluta, et al.,* Case No. 91-6060-Cr-Moreno (S.D. Fla.), Petitioner and numerous other defense lawyers, including Roy

Black, Martin Weinberg, Albert Krieger, Jeff Weiner, Marty Raskin and others, received extensive legal fees in the form of offshore bank checks and cashiers checks that had been routed through foreign exchange houses. *Id.* at pp. 30-32, 38-39. While a few of the checks Petitioner received were "co-endorsed or double-endorsed," the majority were to his name. *Id.* at p. 41. Over the course of five years, Petitioner received "approximately $1 million" in fees. *Id.* at p. 31. AUSA Sullivan concluded his proffer by conceding that the government's evidence concerning Petitioner's knowledge that the fees came from Magluta (and, thus, was in violation of the restraining order), was "circumstantial," *id.* at p. 43, and that there were "no other criminal events, violations by him that haven't been made part of this case." *Id.* at p. 48.

Petitioner and his counsel disagreed with numerous aspects of AUSA Sullivan's proffer. Counsel pointed out that Petitioner was not married until 1990, *i.e.,* shortly before Magluta's indictment. *Id.* at p. 44. Petitioner did not receive cash. *Id.* at p. 44. Moreover, the fees and cost money he received "pale[d] in comparison to some of the other fees that were earned by other counsel" and, as AUSA Sullivan conceded, was paid to them in ***precisely*** the same fashion as Petitioner. *Id.* at pp. 33-35. Nonetheless, Petitioner pled "guilty" to the obstruction charge, acknowledging his guilt under the deliberate ignorance/circumstantial

evidence theory outlined by the prosecutor. *Id.* at p. 47. While he acknowledged accepting "funds from Salvador Magluta knowing of the restraining order," he did not admit to any of the other factual allegations in AUSA Sullivan's proffer. *Id.* at p. 25.

In the plea agreement itself, Petitioner agreed only to plead guilty to the one count of obstruction. The government promised not to seek the forfeiture of the fees paid to Petitioner and to recommend that Petitioner receive sentencing credit for his timely "acceptance of responsibility" under U.S.S.G. § 3E1.1(a). Although Judge Seitz agreed to accept the plea, she noted on the record that "[t]his is a very close case factually." *Id.* at p. 50.

Petitioner's Testimony

By the time of the mitigation hearing, Petitioner was 39 years old. Transcript, July 6, 2001, at p. 66. He has been married for 10 years and has two young children. *Id.* Prior to this case, he had never been subject to Bar discipline or even had a grievance filed against him. *Id.* at p. 67.

Prior to attending law school, Petitioner worked as a teacher with the Miami-Dade County Public School System. He graduated from University of Miami Law School in 1987 and immediately began working for the Miami-Dade County State Attorney's Office. *Id.* at pp. 69-70. He worked as a prosecutor until November

1991, the year the indictment in the *Magluta/Falcon* case was returned. *Id.* at pp. 70, 74-75. At that time, he was only 29 years old and had no experience in either private practice or the federal criminal justice system. When he began work on the *Magluta/Falcon* case, "it was my first criminal defense case, period." *Id.* at p. 75.

Petitioner worked on the case for five years, until the defendants were acquitted in February 1996, under the leadership of several prominent defense attorneys, including Roy Black, Albert Krieger, Marty Weinberg and Jeffrey Weiner. *Id.* at p. 75. He took their instructions concerning the work needed on the case. *Id.* at pp. 77-78 and Respondent's Composite Exhibit 4. He received similar "to do" lists every 2-3 months. *Id.* It was a "full time job" during this period, which made it difficult to handle other cases. *Id.* at p. 77. Petitioner received a total of $880,000 in fees and cost money, on average, $176,000 each year he worked on the case. *Id.* at p. 83.[4/]

When Petitioner was first retained to represent Magluta in December 1991, he was unaware of the restraining order. *Id.* at p. 80. Following the seizure of documents from Magluta's jail cell in 1993, Petitioner learned about the order for the first time. *Id.* at pp. 82, 94. Neither the prosecutors nor any of the other more

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[4/] Out of the funds Petitioner's law firm received, he, of course, had to pay overhead and staff salaries. The figures in the text represent only the gross figures received by Petitioner's firm.

experienced defense attorneys in the case ever alerted him to the possibility of violating a restraining order or advised him to be careful in the manner in which he received his fees. *Id.* at pp. 84-85. However, before Petitioner could answer questions concerning the fact that he was paid in a manner identical to the manner in which the more prominent attorneys in the case were paid, Bar counsel objected and the Referee would not allow further testimony on the subject. *Id.* at p. 83.[5]

The restraining order was dissolved in March 1996, following the acquittals of Magluta and Falcon. *Id.* at p. 85. Upon learning that he was under investigation in 1999, Petitioner offered to "cooperate" with the prosecutors but "[t]hey weren't interested." *Id.* at p. 88. When he was initially charged in August 1999, he voluntarily surrendered in federal court. *Id.* at p. 88. He was not required to forfeit his fees as a condition of his plea. *Id.* at p. 93. Moreover, as discussed below, of all of the attorneys who received fees in the case, only Petitioner and attorney Mark Dachs were charged with violating the restraining order. *See* pp. 18-20 *infra*.

Petitioner acknowledged that his actions were "wrong" and that he should have been "more cautious," but testified that he had not set out to commit any crime. *Id.* at pp. 93-94. "My crime of accepting fees for work I did, I didn't believe was dishonest" at the time. *Id.* at p. 93.

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[5] Petitioner later submitted a detailed, written proffer concerning the substance of his excluded testimony. *See* pp. 18-20 *infra*.

The investigation leading up to his conviction had a "devastating" impact on his practice. "I had a pretty good practice. I have no practice now." *Id.* at p. 91. For several years, he and his family had to move away from their home and rent it out, because he could not afford to keep up with the mortgage payments. *Id.* at p. 91. Petitioner was extremely remorseful about the events:

> I feel horrible. I feel I have brought disrepute on my family, on the Bar, on my profession. I most of all feel bad about putting my kids through separation for those six months [in a prison camp].

Id. at p. 92.

Petitioner also testified about and introduced exhibits documenting the substantial *pro bono* and community-related volunteer work he has performed over the years. Until his suspension, Petitioner provided *pro bono* legal services to the needy through the Cuban-American Bar Association and a program run by the court system. *Id.* at p. 71. Petitioner has also been active in community groups and activities. Since before the birth of his children, Petitioner has been active in the Miami-Dade County Public Schools. *Id.* at p. 73. And, he won an award for work performed for the school system during the 1997-1998 school year. *Id.* at p. 72. More recently, Petitioner has performed work for Habitat for Humanity. *Id.* at pp. 72-73 and Respondent's Composite Exhibit 4.

The Character Witnesses

Albert Krieger. Mr. Krieger was one of the lead attorneys in the *Magluta/Falcon* case. Mr. Krieger has been one of our country's most prominent criminal defense attorneys for several decades. He has been a member of the House of Delegates for the American Bar Association for the last 20 years and is one of the founders and past-presidents of the National Association of Criminal Defense Lawyers ("NACDL"). *Id*. at p. 22. Mr. Krieger met Petitioner during the course of preparing for the trial and worked with him throughout the five-year pre-trial and trial period. *Id.* at pp. 22-23.[6/] Like Petitioner, Mr. Krieger was not aware of the restraining order concerning the receipt of fees when he first entered the case in 1991 and the order was not a subject of discussion among defense counsel in general or with Petitioner in particular. *Id.* at pp. 26, 30-31. Mr. Krieger described Petitioner as "hard working," "sincere" and "a joy to work with." *Id.* at p. 24. He believed Petitioner was "ethical beyond measurement" and would not hesitate to refer cases to him. *Id.* at p. 32; *see also id*. at p. 35.

James Jay Hogan. Mr. Hogan, a peer of Mr. Krieger, has practiced criminal law in Florida and numerous other states for 39 years. *Id.* at pp. 36-37. He is a member of the ABA White Collar Crime Committee, a Fellow of the

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[6/] Magluta and Falcon were ultimately acquitted of all charges in the trial. *Id.* at 24.

American College of Trial Lawyers, the Southern District of Florida's Grievance Committee and numerous other organizations. *Id.* at p. 37. Mr. Hogan has known Petitioner since approximately 1993 and was one of the attorneys who represented Petitioner in his criminal case. Mr. Hogan, knowing the facts of the case, unequivocally vouched for Petitioner's honesty, integrity and ethics. *Id.* at p. 39. "I'd hire him tomorrow." *Id.* at p. 40.

Jeffrey Weiner. Mr. Weiner has been a leading member of the criminal defense bar for 26 years. Like Mr. Krieger, he is a former president of NACDL, and he has frequently lectured on ethics and professionalism and has argued cases in over 25 states. *Id.* at pp. 42-44. Mr. Weiner has known Petitioner since Petitioner worked as a prosecutor and also worked with Petitioner on the *Magluta/Falcon* case. *Id.* at pp. 44-45.[7] Petitioner had just left the State Attorney's Office when he joined the *Magluta/Falcon* defense team and was given "a lot of the investigator type work, the grunt work, so to speak ... to interview witnesses, to go to the jail, to gather evidence, organize evidence, and things like that." *Id.* at pp. 46-47. Despite Petitioner's conviction, Mr. Weiner believes that Petitioner is "a beautiful person who is totally honorable." *Id.* at p. 49.

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[7] Mr. Weiner represented a co-defendant in the case, Orlando Lorenzo. *Id.* at p. 45.

Robert Wells. Mr. Wells has been practicing law in Miami since 1993, and worked on the *Magluta/Falcon* case as a "contract" associate of Mr. Krieger that same year. *Id.* at pp. 50-51. He personally witnessed much of the work Petitioner did on the case. *Id.* at p. 52. After the case ended, Petitioner helped Mr. Wells with his own practice, helping him pick juries and co-counseling cases with him. *Id.* at pp. 53-54. By 1997, they were sharing office space together and Wells employed Petitioner as a "legal assistant/paralegal." *Id.* at pp. 54-55. He never saw Petitioner do anything that he considered inappropriate or unethical and "would trust him with anything." *Id.* at p. 54.

The Honorable Manuel Crespo. Miami-Dade Circuit Court Judge Manuel Crespo also testified on Petitioner's behalf. Judge Crespo has known Petitioner and Petitioner's parents for many years. *Id.* at p. 98. He came to know Petitioner even better once Petitioner joined the State Attorney's Office. At the time, Judge Crespo was a criminal defense attorney. *Id.* at pp. 98-99. "He impressed me as being a very able, very ethical Assistant State Attorney." *Id.* at p. 99. Petitioner was the rare type of prosecutor who was approachable and fair. *Id.* at pp. 100-101. Judge Crespo looked "forward to the day that [Petitioner] will be able to practice before my Court again." *Id.* at p. 102.

Beatrice Medrano. Ms. Medrano, now a "housewife and a stay at home mom," was one of Petitioner's former clients for approximately two years in a Medicaid fraud case. *Id.* at pp. 58-61. She entered a guilty plea and received probation. *Id.* at p. 60. Petitioner was "very professional" with her. *Id.* at p. 61. He was always available and willing to explain legal concepts to her in terms she could understand. *Id.* He was also "extremely ethical and very kind to me." *Id.* For example, during discovery, Petitioner "was always by the book," requiring her and her company to turn over "everything" and not destroy and documents. *Id.* at p. 64. He would say: "This is the law. This is how it has to be done." *Id.* She referred other clients to him, as well, and they also had "wonderful things to say about him." *Id.* at p. 62.

Petitioner also introduced a packet of additional letters and affidavits from other prominent attorneys and former clients. *Id.* at p. 10.

The Conflict of Opinions: The Designated Reviewer vs. The Referee

The Board of Governors of the Florida Bar designed Board Member Steven E. Chaykin to review Petitioner's case. Mr. Chaykin, now in private practice, was an Assistant United States Attorney in the Southern District of Florida between 1985-1994, and served in supervisory positions as Chief of the Public Corruption

Section and as Managing Assistant.[8] As previously noted, Mr. Chaykin recommended to the Referee that Petitioner receive a three-year suspension followed by a lengthy term of probation. *Id.* at p. 103.

While acknowledging the serious nature of the case, Mr. Chaykin believed that the "obstruction" charge was "more like a contempt of Court than an obstruction of justice case." *Id.* He also felt that Petitioner's "young age" and "limited experience in a very sophisticated case" were ameliorating factors. *Id.* "[H]e seemed out of his league." *Id.*

Bar counsel disagreed with Mr. Chaykin's recommendation and pushed for disbarment. As it did during the pre-hearing litigation, Bar counsel took the position that the conviction itself justified disbarment, regardless of the merits of any mitigating evidence Petitioner did put on or even could put on:

> We are not here saying that Mr. Martinez is a bad person. We actually sort of like him. We have heard today that he is a person of good moral character. We're not disputing that. We've had affidavits. We've had letters. We have had very illustrious people come before the Court and say that he is a good person. We have never disputed that.

Id. at p. 127. Despite conceding Respondent's "good moral character," the Bar insisted on disbarring him. *Id.* at pp. 128-129.

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[8] *See Martindale-Hubbell Law Directory*, Volume 5 (Florida), Reed Elsevier, Inc. 2001 ed., at p. FL131B.

The Referee ruled in favor of the Bar. *See* Report of Referee. The Referee found three aggravating factors: (1) the felony conviction itself; (2) a "dishonest or selfish motive"; and (2) a "pattern of misconduct" since Petitioner received more than one fee payment in violation of the restraining order. Report, at pp. 3-4. The Referee, however, also found that the Respondent had introduced proof of five mitigating factors: (1) the absence of any prior disciplinary record; (2) Petitioner's "full and free" disclosures and "cooperative attitude"; (3) his inexperience in the practice of law at the time of the offense; (4) his ethical reputation and "excellent character"; and (5) his statements of remorse. *Id.* at pp. 4-5. Moreover, the Referee found that Petitioner "has the ability to be rehabilitated." *Id* at p. 8. However, the Referee ruled that the felony conviction itself "outweigh[ed]" the mitigating factors and mandated disbarment. *Id.* at p. 8.

The Motion For Rehearing

Petitioner timely sought reconsideration of the Referee's ruling. *See* Respondent's Motion For New Trial and Rehearing, August 2, 2001. In his motion, Petitioner outlined the additional testimony he would have given if the Referee had not sustained Bar counsel's objections. Petitioner proffered that he would have explained that his fees were paid in the same fashion and from the same sources as his far more experienced co-counsel in the *Magluta-Falcon* case. He

attached to his proffer an article published by *The Miami Herald* that identified by name the attorneys and the amounts of the fees, including the following:

ATTORNEYS	**FEES PAID**
Roy Black	**$3,754,955**
Albert Krieger	**$3,620,119**
Martin Weinberg	**$3,483,837**
Benson Weintraub	**$1,500,790**
Jeffrey Weiner	**$ 847,912**
Ed Shohat	**$ 449,330**
Frank Rubino	**$ 447,091**

Petitioner further proffered that, other than Frank Rubino who was paid in cash, he and other trial counsel were paid in a series of checks. *See* Respondent's Motion For New Trial and Rehearing, August 2, 2001, Exhibit A. All the checks received by Petitioner and his co-counsel were accompanied by a letter that essentially assured the recipients that the source of the funds was a third party who would not have been subject to the protective order. *Id.* In addition to assuring the recipients that the monies did not belong to Magluta and Falcon, the letter also assured that the monies were not the proceeds of any illegal activities. *Id.*

Petitioner would have further explained that in mid-1993, Magluta's prison cell was searched by agents of the Federal Bureau of Prisons. *Id.*[9] Magluta retained separate counsel to litigate a tort action against the prison. During that litigation and subsequent litigation in the criminal case regarding items seized, Petitioner became aware of the protective order that later became the subject of his guilty plea. One of the documents seized from Magluta's cell was a "payment sheet." *Id.* That document appeared to reflect cash payments to Frank Rubino, Esq. and other attorneys that worked for Mr. Rubino. However, neither Petitioner nor any other co-counsel were on the "payment sheet." Due to litigation over the seizure, all trial counsel in the case requested a personal meeting with the third party who was paying the fees. *Id.*

Accordingly, sometime before trial, attorneys Albert Krieger, Roy Black, Martin Weinberg, Petitioner and others met with Mr. Alejandro Aguilar at Mr. Krieger's office. *Id.* Petitioner profferred that, at that meeting, Mr. Aguilar stated that he was the source of the fees and was questioned by Messrs. Krieger, Black and Weinberg. *Id.* After the interview, all trial counsel were satisfied with Mr. Aguilar's answers and assurances that the funds were not subject to the protective order and not the proceeds of illegal activities. *Id.*

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[9] Magluta was pre-trial detained from October 1991 to February 1996.

At the time, Petitioner relied on the collective judgment of his more experienced co-counsel that the manner in which the fees were being paid was not in violation of the protective order or any federal or state law. Petitioner also relied on the fact that he was paid in the same manner as all of the other trial counsel. *Id.*

Finally, Petitioner proffered that the more experienced attorneys who received fees in the same manner as he did have never been prosecuted. *Id.*

STANDARDS OF REVIEW

I. An appellate court reviews rulings on the admissibility or inadmissibility of evidence under an abuse of discretion standard. The Referee's denial of Petitioner's motion for rehearing is also reviewable under an abuse of discretion standard. *Donaldson v. State*, 722 So.2d 177, 181 (Fla. 1998). A tribunal "by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996). When a tribunal misinterprets the law in admitting or excluding evidence, the Court's review is "plenary." *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 556 (11th Cir. 1998), *reh'g en banc denied*, 172 F.3d 884 (11th Cir.), *cert. denied*, 528 U.S. 801, 120 S.Ct. 309, 145 L.Ed.2d 42 (1999) (citation omitted).

II. A Referee's recommendations as to discipline are only "persuasive." *Florida Bar v. Varner*, 780 So.2d 1, 5 (Fla. 2001). That is, while the will give some deference to a Referee's recommendations if there is a "reasonable basis in existing case law," *id.* at 5, the scope of the Court's review "is somewhat broader than when reviewing the referee's findings of fact because the Court ultimately has the responsibility to order an appropriate sanction." *Florida Bar v. Clement*, 662 So.2d 690, 698 (Fla. 1995) (citation omitted).

SUMMARY OF THE ARGUMENT

I. The Referee abused its discretion in excluding Petitioner's testimony and in summarily denying his motion for rehearing, because the imposition of discipline without affording the accused a full opportunity to explain "the circumstances surrounding the offense" is a violation of due process. *Florida Bar v. Fussell*, 179 So.2d 852, 855 (Fla. 1965). *Accord Florida Bar v. Pavlick*, 504 So.2d 1231, 1234 (Fla. 1987); *State ex rel. Florida Bar v. Evans*, 94 So.2d 730 (Fla. 1957). Not every "obstruction of justice" charge or conviction of an attorney warrants the same punishment -- either criminally or from this Court. The federal obstruction of justice statute, 18 U.S.C. § 1503, is a "catch-all" provision that sanctions a wife range of conduct -- from murdering grand jury witnesses to presenting false testimony or documents in trials to violating court orders. *United States v. Aguilar*, 515 U.S. 593, 598, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995). As the Designated Reviewer correctly recognized, the "obstruction" charge here involved only the violation of a court order -- conduct that typically is sanctioned by contempt sanctions. Such conduct, although serious, does not warrant disbarment under the circumstances in this case. The Referee committed reversible error in refusing to consider or allow Petitioner's testimony about the mitigating circumstances surrounding the charge in this case --

circumstances that include the fact that numerous highly prominent attorneys who received their fees in the same manner were never prosecuted.

II. The Referee compounded his mistake in refusing to consider the circumstances of the obstruction charge by treating the presumption of disbarment for a felony conviction as essentially irrebuttable. Contrary to the Referee's reasoning, not every felony conviction warrants disbarment. *See Florida Bar v. Smith*, 650 So.2d 980 (Fla. 1995); *Florida Bar v. Diamond*, 548 So.2d 1107 (Fla. 1989); *Florida Bar v. Chosid*, 500 So.2d 150 (Fla. 1987). On the contrary, disbarment is the most "extreme sanction" that this Court can impose on an attorney and, therefore, should be "imposed only in those rare cases where rehabilitation is highly improbable." *Florida Bar v. Kassier*, 711 So.2d 515 (Fla. 1998). However, the Referee himself found that Petitioner "has the ability to be rehabilitated." And, the Bar has conceded that Petitioner "is a person of good moral character." The Referee failed to give proper weight to these factors, as well as to Petitioner's presentation of other mitigating evidence, including extensive character testimony, his lack of any prior disciplinary record, his genuine remorse, his young age and inexperience at the time of the offense and documented proof of *pro bono* and community work. Under these unique circumstances, disbarment was far too harsh a punishment.

ARGUMENT

I. THE REFEREE VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY PREVENTING HIM FROM EXPLAINING THE MITIGATING CIRCUMSTANCES SURROUNDING THE "OBSTRUCTION" CHARGE

A. Petitioner's Due Process Right To Present Mitigating Evidence Involving the Underlying Felony Offense

Under Rule 3-7.2(b) of the Rules Regulating the Florida Bar, a felony criminal judgment constitutes "conclusive proof of guilt of the criminal offense(s) charged" for the purposes of attorney discipline. At the urging of Bar counsel, Referee construed Rule 3-7.2(b) as precluding evidence, including testimony by the Petitioner himself, concerning the mitigating facts and circumstances surrounding the commission of the offense. Presumably for similar reasons, the Referee summarily denied Petitioner's motion for rehearing. As demonstrated below, the Referee abused its discretion in excluding this testimony, because the imposition of discipline without affording the accused a full opportunity to explain "the circumstances surrounding the offense" is a violation of due process. *Florida Bar v. Fussell*, 179 So.2d 852, 855 (Fla. 1965). *Accord Florida Bar v. Pavlick*, 504 So.2d 1231, 1234 (Fla. 1987); *State ex rel. Florida Bar v. Evans*, 94 So.2d 730 (Fla. 1957).

In *Fussell*, the attorney was "convicted" of knowingly making false statements in federal home loan applications, in violation of 18 U.S.C. § 1010. *Fussell*, 179

So.2d at 853. Although the Court's opinion in *Fussell* does not indicate whether the "conviction" followed a trial or plea, it does unambiguously state that Fussell conceded his guilt. *Id.*[10] By way of mitigation, Fussell nonetheless sought to explain the circumstances surrounding his commission of the offense, including that the victim of the crime was not a client, that the crime was not committed using fraud and that the loan was repaid. *Id.* The Board of Governors, however, suspended Fussell for three years, without affording him an opportunity to present this explanation, on the same basis relied upon by the Referee in this case -- that since the felony conviction "conclusively" established guilt, testimony about the mitigating aspects of the offense was irrelevant. *Id.* at 853-854.

This Court reversed and remanded the case back to the Board of Governors to permit consideration of the excluded evidence. *Id.* at 854-855. The Court reasoned that "due process" requires that before determining the appropriate discipline for a felony conviction, the tribunal must afford the attorney an opportunity to explain "the circumstances surrounding the offense and also in mitigation of the penalty." *Id.* at p. 855.

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[10] Before the Referee, the Bar made the erroneous argument that the circumstances surrounding a felony conviction were only relevant where the lawyer entered an "Alford" or nolle contendere plea. *See, e.g.,* The Florida Bar's Motion To Exclude Witnesses, June 20, 2001. *Fussell* plainly refutes the Bar's contention.

Relying on both *Fussell* and its earlier decision in *Evans*, this Court in *Pavlick* similarly held that a lawyer was entitled, again as a matter of "due process," to present mitigating evidence concerning "the circumstances surrounding" his felony conviction. In *Pavlick*, the attorney entered an "*Alford*" plea to misprison of a felony, in violation of 18 U.S.C. § 3, based on evidence that Pavlick had suborned perjury in a federal grand jury proceeding. *Pavlick*, 504 So.2d at 1232. In the hearing before the Referee, Pavlick denied committing the offense and testified that he entered the plea due to pressure from his wife. *Id.* at 1233. The Referee found Pavlick guilty of the allegations charged but suspended Pavlick from the practice of law for only two years based, in part, on Pavlick's mitigating testimony.

The Bar appealed the suspension as too lenient and based on improper evidence concerning the circumstances of Pavlick's plea. However, this Court affirmed the Referee, holding that the Referee properly considered the testimony. "The imposition of discipline without affording the accused an opportunity to explain under these circumstances would violate due process." *Id.* at 1234. *Accord Evans*, 94 So.2d at 735 ("[d]ue process ... requires that the accused lawyer shall be given full opportunity to explain the circumstances and otherwise offer testimony in excuse or in mitigation of the penalty"). *Cf. United States v. Scott*, 909 F.2d 488, 491 n. 1 (11th Cir. 1990)

("[t]o deny a defendant the right to tell his story from the stand dehumanizes the administration of justice") (citation omitted).

The Court's decisions in *Fussell*, *Pavlick* and *Evans* are also in accordance with other decisions of this Court holding that disbarment is not automatically mandated for all attorneys who are convicted of felonies. *See, e.g., Florida Bar v. Jahn*, 509 So.2d 285 (Fla. 1987); *Florida Bar v. Chosid*, 500 So.2d 150 (Fla. 1987); *Florida Bar v. Carbonero*, 464 So.2d 549 (Fla. 1985). Based on this clear body of precedent, the Referee plainly abused his discretion in refusing to consider the facts and circumstances surrounding the felony committed in this case.

B. <u>The Mitigating Circumstances In This Case</u>

There were several mitigating circumstances present in this case that, due to the Referee's legal error, he failed to consider in recommending disbarment instead of a three-year suspension. We address each in turn below.

1. The Nature of the "Obstruction"

Petitioner was convicted of "obstruction of justice" in violation of 18 U.S.C. § 1503(a) under the so-called "Omnibus Clause" of the statute: "Whoever ... corruptly ... endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b)." Although the statute, on its face, requires a "corrupt" design, federal precedents have construed the term "corruptly" to simply

mean that the defendant knowingly and intentionally undertook some action from which an obstruction of justice was a reasonably foreseeable result. *United States v. Banks*, 988 F.2d 1106, 1109 (11th Cir. 1993); *United States v. Neiswender*, 590 F.2d 1269, 1273-74 (4th Cir. 1979). Direct evidence of intent, therefore, is not required. *United States v. Fleming*, 215 F.3d 930, 938 (9th Cir. 2000); *United States v. White*, 557 F.2d 233, 235-26 (10th Cir. 1977).

The Omnibus Clause has thus become a "catchall" provision that is "general in scope." *United States v. Aguilar*, 515 U.S. 593, 598, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995). As such, it prohibits "a medley of crimes." *United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999), *cert. denied*, 529 U.S. 1137, 120 S.Ct. 2021, 146 L.Ed.2d 968 (2000). *See generally Sixteenth Survey of White Collar Crime*, 38 AM. CRIM. L. REV. 1081, 1082 (Summer 2001). Although this entire "medley" results in the same felony conviction under Section 1503, the range of conduct within the medley is not morally equivalent. Surely the passive acceptance of legal fees in violation of a restraining order is not the moral equivalent of, for example, the murder or bribery of a witness, the suborning of perjury or the submission of false documents in judicial proceedings. All these forms of conduct would "obstruct" justice. However, under the rule endorsed by the Bar and Referee in this case, the only material circumstance is the felony conviction itself.

The Designated Reviewer in this case, Mr. Chaykin, correctly perceived that the "obstruction" charge in this case was analogous to "a contempt of Court" rather than the typical "obstruction of justice" cases he had seen. *See* p. 16 *supra*. Mr. Chaykin's analysis was correct.

Willful violations of federal court orders, if treated as criminal at all, are typically prosecuted as criminal contempts under 18 U.S.C. § 401. *See, e.g., United States v. Paccione*, 964 F.2d 1269, 1274-75 (2d Cir. 1992) (affirming criminal contempt conviction for defendant's violation of restraining order entered in racketeering and mail fraud case). Such convictions are treated as misdemeanors where (as in the instant case), the term of imprisonment is twelve months or less. *See United States v. Roach*, 108 F.3d 1477 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 983, 118 S.Ct. 446, 139 L.Ed.2d 382 (1988); *United States v. Rylander*, 714 F.2d 996 (9th Cir. 1983), *cert. denied*, 455 U.S. 944, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1985); *Musidor, B.V. v. Great American Screen*, 658 F.2d 60 (2d Cir. 1981), *cert. denied*, 455 U.S. 944, 102 S.Ct. 1440, 71 L.Ed.2d 656 (1982).

In many instances, violations of restraining orders are sanctioned only with civil contempt. *See, e.g., United States v. Barnette*, 129 F.3d 1179 (11th Cir. 1997) (wife of criminal defendant held in civil contempt for "lack of cooperation" in husband's "scheme to avoid enforcement of the forfeiture" orders); *Citronelle-Mobile*

Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301-1302 (11th Cir. 1991) (affirming contempt sanctions for businessman's willful dissipation of corporate assets in violation of restraining orders); *Jaeger v. Massis*, No. 00-7390 (2d Cir. Nov. 3, 2000), 2000 U.S. App. LEXIS 27908 (upholding civil contempt sanction for willful violation of temporary restraining order).

The Referee committed reversible error in treating all felony "obstruction" charges as equally serious and deserving of the same punishment. Since not all obstructive conduct is the same, Petitioner should have been permitted to fully explain the circumstances underlying his plea and conviction.

2. *Petitioner's Mens Rea*

As noted above, a conviction for obstruction of justice under the "Omnibus Clause" of Section 1503 only requires circumstantial evidence that the defendant knowingly and intentionally undertook some action from which an obstruction of justice was a reasonably foreseeable result. As demonstrated by AUSA Sullivan's proffer during the plea colloquy, the evidence against Petitioner was entirely circumstantial. Indeed, the prosecutor essentially based his case against Petitioner on two factors: (1) Petitioner's pedigree as Salvador Magluta's alleged "brother-in-law";[11/]

[11/] Contrary to the prosecutor, Petitioner's marriage to the sister of Magluta's ex-wife did not make him Magluta's "brother-in-law." It is well established that two (continued...)

and (2) Petitioner's willful blindness or deliberate ignorance to the source of the funds being used to pay the legal fees for ***all*** the lawyers in the case.[12/]

In pleading guilty, Petitioner agreed that he was guilty under such a theory. Thus, he acknowledged before the Referee that he should have been "more cautious" about the source the fees he accepted. However, Petitioner should have been permitted to fully explain that his conduct was, in reality, no different from a multitude of highly respected members of the criminal defense bar who accepted fees under indistinguishable circumstances.

Petitioner should have been allowed to fully demonstrate, and the Referee should have fully considered, the fact that Petitioner's prosecution was novel and designed, in effect, as a warning to the defense bar. Respondent was charged on the theory that criminal defense attorneys cannot safely accept fees to represent criminal defendants, even from third parties, unless the attorneys engage in an independent

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[11/](...continued)
men do not become "brothers-in-law from the circumstance of having married sisters." *Cruce v. State*, 100 So. 264 (Fla. 1924) (citations omitted).

[12/] Under federal law, the government may establish *mens rea* through "deliberate ignorance." *See United States v. Rivera*, 944 F.2d 1563, 1570 (11th Cir. 1991) ("`if a party has his suspicions aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance, he is deemed to have knowledge'"). *See generally* Committee On Pattern Jury Instructions, District Judge's Association, Eleventh Circuit, *Pattern Jury Instructions (Criminal Cases)*, 1997 Edition, Special Instruction No. 8 (entitled "DELIBERATE IGNORANCE (AS PROOF OF KNOWLEDGE)").

"investigation" into the bona fide nature of the "source" of the fees. If a restraining order exists and an attorney fails to conduct a sufficiently extensive investigation, and the source of the fees turns out to be tainted, whatever questions the attorney did not ask or investigatory steps the attorney failed to take to uncover the truth constitutes "deliberate ignorance" and circumstantial evidence of obstruction of justice.

Neither at the time Petitioner entered his plea nor even today is there any statute, regulation, rule of law or binding court precedent which either (1) imposes such an investigatory duty on defense counsel or (2) defines the scope of that duty. Into this breach, the government has thrown the "deliberate ignorance" doctrine. Absent a "duty to investigate," lawyers cannot "deliberately avoid" learning facts which could only be learned if such an investigation had been undertaken. *Cf. United States v. Chiarella*, 445 U.S. 222, 234-35 (1980) (where allegations of fraud are based upon "nondisclosure," there can be no fraud absent a "duty to speak").

No court, before or after Petitioner's prosecution, has had held that attorneys may be prosecuted for failing to adequately investigate the source of their fees. Indeed, in accepting Petitioner's guilty plea, Judge Seitz acknowledged the "very close" nature of the "case factually." *See* p. 9 *supra*. What scattered law there is in the area has been developed primarily in the ***civil*** forfeiture arena, where the government's requests for forfeiture are predicated upon claims that the property

owner has obtained property which is later determined to be a criminal proceed and where the burden of proof has shifted to the claimant to establish his or her continued right to the property. Even in the forfeiture context, however, the government's theory of prosecution would have been unique.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), the Supreme Court noted that it would be "difficult" to reject a constitutional challenge to a forfeiture where the owner of the subject property had done all that ***reasonably could be expected*** to prevent the illegal use of his property. 416 U.S. at 686, 689-90. However, "the *Calero* standard does not require that the claimant make all efforts, he need merely make all ***reasonable*** efforts." *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496, 1506 (11th Cir. 1992) (emphasis added). "`Reasonableness limits the burden.'" *Id*. (citation and footnote omitted). If the concept of "reasonableness" means anything, it means that an owner cannot "reasonably" be expected do more than "the police have been incapable of doing." *Id*.

Accordingly, if an attorney is offered fees by a third party to represent a criminal defendant, and that third party benefactor has not been charged with any crime, and the benefactor represents that the funds are legitimate, the attorney's obligation to "investigate" is satisfied. There is no statute, law, regulation and, at least prior to

Petitioner's prosecution, no court precedent holding otherwise. Attorneys cannot "reasonably" be expected to have been privy to more sources of intelligence than the vast computer banks and investigatory resources of the United States government.

The only court decisions counsel have found discussing the alleged obligations of a criminal defense attorney when accepting fees from a defendant are *United States v. Nesser*, 939 F. Supp. 417 (W.D. Pa. 1996), and *In re: Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463 (E.D. Va. 1994), *aff'd in part, rev'd in part sub. nom, United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996), *cert. denied*, 519 U.S. 1101, 117 S.Ct. 788, 136 L.Ed.2d 730 (1997). Both are easily distinguishable.

In *Nesser*, the district court approved a deliberate ignorance instruction during the trial of an attorney for money laundering and drug trafficking. However, the lawyer in that case, Nesser, not only represented a drug trafficker-client in the client's criminal case, he "handled property transactions" for the client (including the purchase of a farm and "the shame sale" of a house), had a "detailed knowledge of [the client's] financial affairs" and made a series of "misrepresentations" to an IRS agent. *Nesser*, 939 F. Supp. at 419, 421. Under these circumstances, Nesser could not blindly disclaim knowledge concerning the nature of his clients' funds. The government has never claimed Petitioner represented Magluta (much less the third party benefactor) in

financial matters or that Petitioner took it upon himself to learn Magluta's "financial affairs."

Moffitt is a civil forfeiture case where the lawyer-claimants both bore the burden of proof and lacked the due process-based protections of a criminal case. In *Moffitt*, the court rejected a law firm's "reasonable efforts" defense to a forfeiture. The law firm had accepted a large cash fee in small bills, knew the client's only legitimate employment was as an auto mechanic, knew the client was "broke" and was continuing to sell drugs and knew from the prosecutors that an IRS "net worth" investigation revealed that ***all*** of the client's assets were drug-related. Under these circumstances, the court ruled that the attorneys had an obligation to question the client about the source of the fees and that their failure to do so amounted to "willful blindness." 846 F. Supp. at 473, *aff' in part*, 83 F.3d at 665.

Neither *Nesser* nor *Moffitt* has never been followed in any reported decision by the United States Court of Appeals for the Eleventh Circuit. Conversely, the existence of an indictment against a criminal defendant is not enough to place a "duty to investigate" the source of the funds tendered by client to pay the lawyer's fee, even in the civil forfeiture context:

> [I]f an indictment or other serious accusation is enough, by itself, to create knowledge of a high probability of the taint that would trigger a duty to investigate the source of a fee, attorneys would be reluctant to take on any clients accused

> of drug trafficking. Generally speaking, should an innocent ownership claim be defeatable simply because the property was owned by one accused of drug trafficking, a lawyer would hesitate ever to accept a fee in a drug case, a money laundering case, a structuring case, [statutory citations omitted], or a RICO case, [statutory citation omitted]. There is, of course, no absolute Sixth Amendment right to the attorney of one's choosing, *see Chaplin & Drysdale v. United States*, 491 U.S. 617, 624-25, 109 S.Ct. 2646, 2652, 105 L.Ed.2d 528 (1989), but we do doubt that the [forfeiture] statute was meant to induce such a result. At all events, this difficult and vexatious problem needs much further consideration.

United States v. One 1973 Rolls Royce, V.I.N. SRH-16266, 43 F.3d 794, 812 n. 17 (3d Cir. 1994).

The existence of a restraining order in the *Magluta/Falcon* case meant only that attorneys could not take fees from the charged defendants or their close family members. The receipt of fees from a third party, as occurred in the instant case, did not -- under any pre-existing law, statute, regulation or precedent -- did not create "a high probability of the taint that would trigger a duty to investigate the source of a fee."

Petitioner's prosecution was thus designed to do what no law, statute, regulation or precedent had done before -- send a message to the criminal defense bar to "investigate" the source of their fees "or else" face criminal prosecution. Although the proceedings before the Referee may not have been the proper forum to contest the

government's use of a criminal case to "legislate" legal duties on attorneys,[13/] it was and is appropriate to consider the novelty and selectivity of Petitioner's prosecution in the determining the appropriate sanction.

II. DISBARMENT IS AN EXCESSIVE SANCTION FOR PETITIONER'S FELONY CONVICTION IN LIGHT OF THE EXPERIMENTAL NATURE OF HIS PROSECUTION, THE EXTRAORDINARY MITIGATION EVIDENCE, THE BAR'S CONCESSION THAT PETITIONER WAS "A PERSON OF GOOD MORAL CHARACTER" AND THE REFEREE'S OWN FINDING THAT PETITIONER "HAS THE ABILITY TO BE REHABILITATED"

Although a Referee's recommendation as to discipline is persuasive, this Court has the "ultimate responsibility to impose an appropriate sanction." *Florida Bar v.*

[13/] Courts construing the Bank Secrecy Act have repeatedly barred criminal prosecutions where no pre-existing currency reporting obligations existed by law or regulation. *See United States v. Phipps*, 81 F.3d 1056 (11th Cir. 1996) (where banks "never had a legal duty to file" forms, defendants "may not be held criminally liable" under Bank Secrecy Act statutes); *United States v. Denemark*, 779 F.2d 1559 (11th Cir. 1986) (same). *See also United States v. St. Michael's Credit Union*, 880 F.2d 579, 593-596 (1st Cir. 1989); *United States v. Bucey*, 876 F.2d 1297 (7th Cir. 1989); *United States v. Mastronardo*, 849 F.2d 799 (3d Cir. 1988); *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987); *United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985).

Moreover, when criminal charges are predicated upon allegations that the defendant has breached some legal duty, the charges are subject to dismissal when the application of the law is uncertain. Thus, "`[i]t is settled that when the law is vague or highly debatable, a defendant -- actually or imputedly -- lacks the requisite intent to violate it.'" *United States v. Heller*, 830 F.2d 150, 154 (11th Cir. 1987), quoting *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974). *Accord James v. United States,* 366 U.S. 213 (1961); *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc).

Cibula, 725 So.2d 360, 363 (Fla. 1998). *Accord Florida Bar v. Cox*, No. SC96217 (Fla. May 17, 2001), 2001 Fla. LEXIS 1025, 26 Fla. L. Weekly S 331; *Florida Bar v. Solomon*, 711 So.2d 1141, 1146 (Fla. 1998); *Florida Bar v. Clement*, 662 So.2d 690, 698 (Fla. 1995); *Florida Bar v. Reed*, 644 So.2d 1355, 1357 (Fla. 1994); *Florida Bar v. Pearce*, 631 So.2d 1092, 1093 (Fla. 1994). The Court must evaluate the discipline imposed on an attorney under three criteria: (1) it must be "fair society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty"; (2) it must be "fair to the [attorney], being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation"; (3) it must be "severe enough to deter others who might be prone or tempted to become involved in like violations." *Cibula*, 725 So.2d at 363, quoting *Reed*, 644 So.2d at 1357 (citation omitted).

Although the Referee cited these criteria as guideposts to his analysis, the Referee's analysis was skewed by his abiding belief that Standard 5.11 required the ultimate sanction of disbarment due to the felonious nature of Petitioner's conviction alone. *See* Report, at p. 6. Indeed, as discussed in Section I *supra*, the Referee would not even allow Petitioner to fully explain the nature of that offense. Standard 5.11, however, states only that disbarment is appropriate for the commission of a

felony "***[a]bsent*** aggravating or mitigating circumstances." Standard 5.11 (emphasis added). We respectfully submit that the Referee's analysis unfairly discounted the unique and extensive mitigating factors present in this case.

The Bar itself conceded that, despite Petitioner's felony conviction, it "never disputed" that Petitioner was "a person of good moral character." *See* p. 17 *supra*. In addition to that extraordinary concession, the creme of the defense bar in South Florida either testified before the Referee or submitted written affidavits for the Referee's consideration. The Referee failed to give proper weight to this host of character witnesses, or to Petitioner's lack of a prior record, his past employment history in the public service sector and *pro bono* and community activities. *See Florida Bar v. Cox*, No. SC96217 (Fla. May 17, 2001), 2001 Fla. LEXIS 1025, at * 22-24, 26 Fla. L. Weekly S331 (suspension, not presumptive disbarment, appropriate sanction for presenting false testimony where attorney had a "previously unsullied reputation" and episode was an "isolated lack of judgment"); *Florida Bar v. Thomas*, 698 So.2d 530 (Fla. 1997) (rejecting Bar's request for disbarment and imposing 90-day suspension predicated upon attorney's lack of a prior record and isolated nature of the misconduct). *See also Florida Bar v. Rose*, 607 So.2d 394 (Fla. 1992); *Florida Bar v. Scott*, 566 So.2d 765 (Fla. 1990); *Florida Bar v. Greenfield*, 517 So.2d 16 (Fla. 1987).

Petitioner is an attorney with an outstanding reputation, ethically and professionally. His actions were a one-time event. He has taken his *pro bono* obligations to heart and has conducted himself in an upright and honorable manner since these events. The sanction of disbarment was extreme and unjustified under these circumstances. *Compare Florida Bar v. Brown*, 790 So.2d 1081 (Fla. 2001) (attorney's participation in client's election fraud ameliorated by his lack of prior disciplinary record, cooperative attitude during the proceedings, deep remorse, reputation among his peers and active *pro bono* and community activities). Disbarment would also be also grossly disproportionate to the actual conduct underlying Petitioner's conviction.

As discussed in Section I, Petitioner's crime was, in essence, the violation of a restraining order. In *Florida Bar v. Cibula*, 725 So.2d 360 (Fla. 1998), the Court found that a 91-day suspension was sufficient punishment for an attorney, ***with*** a prior disciplinary record, who lied under oath in a court proceeding. Cibula's conduct was actually more serious and more "obstructive" of the administration of justice than Petitioner's conduct. Cibula simply was lucky enough not to have been criminally prosecuted for his perjury. That fortuity, however, hardly justifies punishing Petitioner more harshly than Cibula. Like the commission of a felony, the presentation of false testimony in a judicial proceeding is presumptively deserving of disbarment under this Court's precedents. *See Florida Bar v. Cox*, No. SC96217 (Fla. May 17, 2001), 2001

Fla. LEXIS 1025, at *18, 26 Fla. L. Weekly S331 (citation omitted). If anything, the fact that Petitioner, unlike Cibula, has already been separately punished should serve as an ameliorating factor in the instant forum. *Cf. Florida Bar v. Lopez*, 406 So.2d 1100, 1102 (Fla. 1981) (suspending attorney for one year, noting that if he had been convicted of witness tampering he would have been subject to a one-year term of imprisonment).

The commission of other forms of "obstructive" conduct has likewise drawn sanctions from this Court far short of disbarment. *See, e.g., Cox*, No. SC96217 (Fla. May 17, 2001), 2001 Fla. LEXIS 1025, 26 Fla. L. Weekly S331 (although disbarment was the presumptive sanction, prosecutor who intentionally concealed false testimony of a key witness from the defendant punished only by a one year suspension); *Florida Bar v. Varner*, 780 So.2d 1 (Fla. 2001) (creation of "fictitious court documents" and "misuse" of official documents that was "prejudicial to the administration of justice" sanctioned by 90-day suspension); *Florida Bar v. Klauser*, 721 So.2d 720 (Fla. 1998) (approving 3-year suspension for repeatedly forging signatures on documents submitted to a court); *Florida Bar v. Kravitz*, 694 So.2d 725 (Fla. 1997) (attorney who "lied to the court and tried to extort money from his client" was suspended for 30 days); *Florida Bar v. Carswell*, 624 So.2d 259 (Fla. 1993) (180-day suspension for tampering with witness warrants); *Florida Bar v.*

O'Malley, 534 So.2d 1159 (Fla. 1988) (imposing three-year suspension for attorney who lied under oath); *Florida Bar v. Pearce*, 356 So.2d 317 (Fla. 1978) (attorney publicly reprimanded for participating in plans for witnesses to testify falsely); *Florida Bar v. Brooks*, 336 So.2d 359 (Fla. 1976) (attorney publicly reprimanded following conditional guilty plea for testifying falsely in an inquest).

Petitioner does not contend that the Court should ignore the fact that Petitioner's conduct also entailed a criminal conviction. However, if that conviction had been for criminal contempt under 18 U.S.C. § 401, rather than for obstruction of justice under 18 U.S.C. § 1503, the crime would have been considered a misdemeanor due to the six-month term of imprisonment imposed by Judge Seitz. *See* p. 29 *supra*. Misdemeanors generally result in only public reprimands by this Court. *See, e.g., Florida Bar v. Farinas*, 608 So.2d 22 (Fla. 1992).

Although the obstruction charge was a felony, it was far different from the situation that occurred in *Florida Bar v. Wolis*, 783 So.2d 1057 (Fla. 2001) (per curiam), the case principally relied upon by both the Bar and the Referee. Wolis pled guilty to felony obstruction of justice arising out of a massive securities fraud indictment. *Wolis*, 783 So.2d at 1058. His actions were all affirmative ones and designed to inflate stock in a company in which he owned 35,000 shares of common stock. *Id.* at 1060. He thus assisted in repeatedly preparing and submitting false and

fraudulent company reports to the SEC. Moreover, when the SEC began investigating the conduct, instead of cooperating with the investigation, Wolis "lied under oath during the SEC's investigation" in an effort to keep it concealed. *Id.* at 1058. Wolis was also a very experienced attorney. *Id.* Under these circumstances, the Court affirmed a recommendation of disbarment.

The situation in *Wolis* is plainly distinguishable from the instant case. At the time the conduct occurred, Petitioner was a young, inexperienced attorney. He did not concoct any false documents or lie under oath in any proceeding. He merely accepted legal fees in the same fashion as numerous other more experienced defense attorneys -- many of whom received far more in fees than Petitioner yet were not criminally prosecuted, *see* p. 18 *supra*, nor apparently sanctioned by the Bar.[14/]

Under these circumstances, the felony conviction warrants the three-year suspension recommended by Mr. Chaykin, not disbarment. *See Florida Bar v. Smith*, 650 So.2d 980 (Fla. 1995) (3-year suspension for attorney convicted of felony tax evasion and causing false statements to be submitted to the Federal Election Commission); *Florida Bar v. Diamond*, 548 So.2d 1107 (Fla. 1989) (3-year suspension for felony mail and wire fraud conviction sufficient due to age of attorney,

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[14/] To date, there are no published sanctions against Roy Black, Marty Weinberg, Albert Krieger or the other prominent attorneys discussed *supra*.

prior unblemished record and abundant character testimony); *Florida Bar v. Chosid*, 500 So.2d 150 (Fla. 1987) (3-year suspension for felony tax charges).

In contrast, the sanction of disbarment is "[t]he extreme sanction" and should be "imposed only in those rare cases where rehabilitation is highly improbable." *Florida Bar v. Kassier*, 711 So.2d 515 (Fla. 1998). The Referee himself found that Petitioner "has the ability to be rehabilitated." *See* p. 5 *supra*. And, the Bar has conceded that Petitioner "is a person of good moral character." *See* p. 17 *supra*. Disbarment, therefore, is too harsh a punishment here.

CONCLUSION

For all of the foregoing reasons, the Court must either reverse and vacate the Report of the Referee in this matter or reduce Petitioner's sanction from disbarment to a suspension for three years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was mailed this 22nd day of October 2001 to:

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CERTIFICATE OF COMPLIANCE

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

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G. Richard Strafer