

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JAMES C. BURKE, SR.,

Respondent.

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Supreme Court Case  
No. SC00-827

The Florida Bar File  
No. 2000-70,772(11L)

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The Florida Bar's Answer Brief

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## **SYMBOLS AND REFERENCES**

For the purpose of this Answer Brief, The Florida Bar will be referred to as The Florida Bar, the Bar, or TFB. James C. Burke, Sr., will be referred to as either Respondent or R. Other persons will be referred to by their respective surnames.

References to the transcript of the final hearing will be set forth as TR and page number. References to the Report of Referee will be set forth as ROR and page number.

## STATEMENT OF THE CASE AND OF THE FACTS

Respondent was an elected member of the Miami-Dade County Commission and the Chairman of the Finance and Trust Funds Committee. (T. 17, 18).

Howard Gary is the principal owner of a bond underwriting business. (T. 20).

Respondent accepted approximately \$100,000.00 from Howard Gary. That money was used to influence Respondent in his official capacity as a county commissioner. In exchange for that money, Respondent directed business transactions for and on behalf of Miami-Dade County to various business entities controlled by Howard Gary. (Exhibits A & B to TFB's Complaint).

As a result of his criminal activity, Respondent was named as a defendant in a multi-count superceding indictment filed in the United States District Court for the Southern District of Florida Case No. 98-3-CR-Davis. Respondent's case proceeded to trial by jury and he was found guilty on October 21, 1999 of one count of knowingly and corruptly agreeing to accept something of value, intending to be influenced and rewarded in his official capacity in connection with a business transaction and a series of transaction between Dade County and other business entities. (Exhibits A & B to TFB's Complaint).

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Consequently, on November 17, 1999, The Florida Bar filed a Notice of Judgment of Guilt based on Respondent's federal felony conviction. On December 3, 1999, this Honorable Court entered an order felony suspending Respondent. On

April 14, 2000, The Florida Bar filed its disciplinary complaint based on the foregoing facts. On November 25, 2002, The Florida Bar filed its Motion for Partial Summary Judgment as to the issue of Respondent's guilt. On December 26, 2002, Respondent filed a Response to The Florida Bar's Motion for Partial Summary Judgment and Respondent also filed a Motion to Strike Prejudicial Attachments. On January 24, 2003, the Referee entered an order granting The Florida Bar's Motion for Summary Judgment and deferring ruling on Respondent's Motion to Strike. The Referee found that Respondent had violated the following rules: Rule 4-8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another), Rule 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), and Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct; and Rule 3-4.3 (... The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline) of the Rules of Discipline.

This matter proceeded to final hearing solely on the issue of discipline. On January 13, 2003, The Florida Bar filed its Pre-Trial Catalogue. On January 17, 2003, Respondent filed his Pre-Trial Catalogue. On January 28, 2003, The Florida Bar filed a Motion to Strike Portions of Respondent's Pre-Trial Catalogue contending that it included documents that were either irrelevant or were an attempt to go behind Respondent's conviction. On February 5, 2003, the Referee entered an order partially granting The Florida Bar's motion.

At final hearing on February 12, 2003, the Bar asked the Referee to recommend that Respondent be disbarred. The Bar did not present any witnesses in aggravation, only argument. Billy Hardemon, a co-defendant in Respondent's indictment, was Respondent's only character witness. He has been Respondent's close personal friend for 30 years. (T. 44). Hardemon testified regarding Respondent's reputation for truthfulness and involvement in the community. (T. 40, 43). Respondent also testified as to his community service and involvement. (T. 11-18). The Bar then argued that the appropriate discipline was disbarment based on the applicable Standards for Imposing Lawyer Sanctions, case law, and aggravation. Respondent's prior disciplinary record included cases involving neglect and theft, resulting in a 90-day suspension in January, 1988, a 91-day suspension in May, 1991, and a 30-day suspension in November, 1996. (T. 57-58).

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On March 24, 2003, the Referee issued a report recommending that Respondent be disbarred. Respondent has petitioned for review of the recommended discipline. This appeal follows.

## **SUMMARY OF THE ARGUMENT**

This Court has consistently held that a referee's findings of fact carry a presumption of correctness and should be upheld if supported by substantial, competent evidence. In the case at bar, the Referee's findings are supported by competent, substantial evidence. Respondent was convicted of a federal crime: knowingly and corruptly agreeing to accept something of value intending to be influenced and rewarded in his official capacity. His judgment and conviction in federal court were introduced by the Bar in its Motion for Partial Summary Judgment. Pursuant to the Rules Regulating The Florida Bar, Respondent's felony conviction is conclusive proof of his guilt. Thus, the Referee appropriately granted the Bar's Motion for Partial Summary Judgment and properly excluded evidence which would have gone behind Respondent's felony conviction. Final hearing proceeded as to discipline only.

Respondent, incarcerated during the disciplinary proceedings, disingenuously argues that he was denied a fair hearing because of his lack of representation, and his inability to access research materials and present witnesses. However, Respondent has no right to representation and was afforded the right to testify on his own behalf (albeit telephonically), and to present witnesses. Moreover, any limitations he may have experienced in his defense were the result of his own acts and were not prejudicial.

Respondent's illegal acts struck at the very core of the legal system. Consequently, the Referee appropriately recommended that Respondent should be disbarred. That recommendation is supported by the Standards for Imposing Lawyer Sanctions and case law. Lawyers convicted of felonies involving bribery of elected public officials warrant the sanction of disbarment. The presumption of disbarment was not overcome by Respondent's mitigation.

The discipline recommended by the Referee has a reasonable basis in both case law and the Florida Standards for Imposing Lawyer Sanctions and therefore should be upheld.

## ARGUMENT I

### **THE REFEREE'S RULINGS AT FINAL HEARING WERE FAIR AND IN ACCORDANCE WITH THE APPLICABLE RULES AND LAW, INCLUDING HER RELIANCE ON RULE 3-7.2(i)(3) OF THE RULES REGULATING THE FLORIDA BAR.**

A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *See, The Florida Bar v. Vining*, 761 So. 2d 1044, 1047 (Fla. 2000); *The Florida Bar v. MacMillan*, 600 So. 2d 457, 459 (Fla.1992); *The Florida Bar v. Vannier*, 498 So. 2d 896, 898 (Fla. 1986).

If the referee's findings are supported by competent, substantial evidence, this Court is precluded from re-weighing the evidence and substituting its judgment for that of the referee. *See, MacMillan*, at 600 So. 2d 459 (Fla.1992). The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *See, The Florida Bar v. Miele*, 605 So. 2d 866, 868 (Fla.1992). The Respondent fails to meet that burden and the Referee's findings and recommendation and should be affirmed.

Rule 3-7.2(i)(3) of the Rules Regulating The Florida Bar provides that a determination of guilt of a felony shall constitute conclusive guilt of the offense

charged. Application of this rule to the instant case makes it clear that Respondent must be found guilty of having committed the crime of which he stands convicted. This is not to say that Respondent does not have a right to be heard. He does. However, when the rule is read in light of the applicable case law, it is apparent that the right to be heard is limited.

Respondent's criminal case was tried before a jury which returned a guilty verdict on October 21, 1999 as to one count of Respondent's knowingly and corruptly agreeing to accept something of value, intending to be influenced and rewarded in his official capacity in connection with a business transaction and a series of transactions between Dade County and other business entities. Respondent appealed his conviction to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit affirmed his conviction.

Consequently, the Bar sought and obtained summary judgment as to Respondent's violation of Rule 4-8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another), Rule 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), and Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct, and Rule 3-4.3 (... The commission by a lawyer of any act

that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline) of the Rules of Discipline. Therefore, the only issue to be determined at final hearing was that of appropriate discipline to be imposed.

While the law allows evidence in mitigation of discipline, it does not allow for retrial of the criminal case. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979); The Florida Bar v. Kandekore, 766 So.2d 1004 (Fla. 2000). Nonetheless, Respondent argues that he was prejudiced by the Referee when she forbade him from introducing evidence pertaining to his criminal conviction. Respondent argues that the excluded evidence, including jurors' statements, an F.B.I. report and videotape, and evidence pertaining to Miami-Dade County's bond process, was proper mitigation. In fact, it was not. Rather, it was an effort to go behind his criminal conviction and thus, was properly excluded by the Referee.

The issue in The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987), was whether an attorney in a disbarment proceeding predicated upon a felony conviction may offer in mitigation evidence of the circumstances surrounding his

*Alford* plea.<sup>1</sup> This Court answered in the affirmative finding that doing so *under these circumstances* did not involve a trial *de novo* because the respondent's version of the underlying case and the reasons for his plea were consistent with his *Alford* plea. Such is not the situation in the instant case. In the matter *sub judice*, there was no "Alford" plea. Rather, Respondent denied his guilt and proceeded to trial before a jury which returned a guilty verdict on one count of the indictment. The evidence leading to that conviction, i.e., the F.B.I. report and videotape, had already been considered at a higher standard than that prompted by disciplinary proceedings. The Respondent's efforts to have the Referee view that same evidence was simply an effort to have her reach a different conclusion than the jury had. Thus, it was properly excluded.

In one of the earliest cases addressing the issue of a respondent's right to present evidence surrounding the circumstances of his adjudication, *The Florida Bar v. Evans*, 94 So.2d 730 (Fla. 1957), the respondent was permitted to put on evidence of the serious physical illness which precipitated his *nolo contendere* plea to the criminal charges against him. This ruling is not inconsistent with the Bar's position. Illness is a factor in mitigation under the Florida Standards for Imposing Lawyer Sanctions.

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<sup>1</sup> [A] plea containing a protestation of innocence when... a defendant intelligently concludes that his interests require entry of a guilty plea..." North Carolina v. Alford, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

In The Florida Bar v. Fussell, 179 So.2d 852 (Fla. 1965), the respondent was suspended for a period of three years without opportunity to present *any* testimony in mitigation of the penalty. This Court held that where disbarment of an attorney is sought, due process requires that the attorney be noticed and provided reasonable opportunity to be heard. The Court noted that while the governing rule provided for a judgment of conviction to stand as conclusive proof of guilt of the offense, it was a rule of evidence and not in and of itself conclusive as to the ultimate disciplinary sanction to be taken. Hence this Court's conclusion that due process requires notice and opportunity to be heard both in person and through witnesses.

It must be noted that Fussell was provided *no* opportunity to be heard prior to his suspension and the issue before the Court was whether the Board of Governors (this case was tried under predecessor governing rules) could impose discipline based on a felony conviction without affording the accused attorney the opportunity to present witnesses and his own testimony in regard to mitigation. Clearly, the answer is it could not. The Bar agrees that respondents enjoy a due process right to be heard in mitigation. In the instant case, the Respondent Burke was afforded his due process rights. He testified, as did a character witness on his behalf. What the Respondent could not do is offer evidence in contradiction of his guilty conviction. To do so would be to go behind the conviction and essentially

retry the criminal case. While the case law allows evidence in mitigation of discipline, it does not allow for retrial of the criminal case.

It is also important to note that Fussell's offering in mitigation consisted in good part of evidence that the misconduct did not arise in an attorney-client relationship, no financial injury remained, sanctions had been imposed against the respondent in another forum, and he had family responsibilities which included his earning a living as an attorney. These are mitigating factors which do not negate respondent's conviction. While Fussell also would have offered in evidence that his crime was not grounded in fraud and the offense was a technical one (knowingly making false statements is an application for a home improvement loan), the opinion does not tell us the procedural history of Fussell's criminal conviction. We know only that he was convicted. We do not know if that conviction followed a trial or a plea. We do not know if any protestation of innocence took place before the court. We do not know if Fussell conceded his guilt. Regardless, it is evident from a reading of The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), that a respondent cannot go behind his criminal conviction and secure a trial *de novo* before the referee.

Most importantly, later cases including The Florida Bar v. Isis, 552 So.2d 913 (Fla. 1989), The Florida Bar v. Cohen, 583 So.2d 313 (Fla. 1991), and Pavlick, *supra*, clearly stand for the proposition that where there is record evidence that a

plea to criminal charges was accompanied by protestations of innocence, a respondent may offer evidence of the underlying criminal case and the reasons for the plea.<sup>2</sup>

The Referee also correctly excluded evidence as to Respondent's rendition of post trial jurors' statements. Specifically, alleging error, Respondent points to the denial of his request to put on evidence "... based upon the public statements of several jurors, as well as three who initiated later conversations with Respondent, about Respondent's community and public trust standing", arguing further that "the fact-finders (jurors) stated clearly that the government's conspiratorial tactics offended the public trust, not Respondent's conduct." (R's Initial Brief, p.18).<sup>3</sup> However, those statements were neither mitigating evidence nor relevant. The fact is that those same jurors convicted Respondent of a serious felony involving public corruption which resulted in his imprisonment. Respondent contends that he should have been allowed to introduce the jurors' statements to refute the Referee's ultimate conclusion that "Respondent's actions... severely destroyed the

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<sup>2</sup> In Isis, there was no protestation of innocence and the respondent was precluded from presenting evidence that his prosecution was the result of a vendetta by an agency which he had successfully defeated in earlier court proceedings. Isis was disbarred.

<sup>3</sup> Despite the Referee's ruling, Respondent has inappropriately attached a copy of a newspaper article to his brief which reports the comments of a juror from Respondent's felony trial. This article was not part of the trial record and should not be considered by this Court.

public trust.” (ROR, p.2). The Respondent evidently misconstrues the Referee’s conclusion which is a simple truism regarding acts of corruption by public officials.

Respondent’s Brief repeatedly cites to The Florida Bar v. Smith, 650 So.2d 980 (Fla. 1995). This case resulted in a 3 year suspension for a lawyer who was also an elected official who had been convicted of income tax evasion and making a false statement to the Federal Election Commission. Given the felony convictions, the referee found the respondent guilty and proceeded with the sanction phase at which mitigating and aggravating evidence was presented. Smith was not disbarred in good part due to the mitigating evidence pertaining to his financial problems and inability to pay his taxes. Thus, the referee concluded that a selfish desire for pecuniary gain was not present. In the instant case, however, Respondent’s crime is one involving corruption; that is, a personal pecuniary gain in exchange for acts directly associated with his public office. The evidence, as well as the two cases, are simply not analogous.

In addition to arguing error regarding the exclusion of evidence pertaining to his criminal conviction, the Respondent argues that he was prejudiced in other ways by the Referee’s rulings, as well as by his incarceration during the disciplinary proceedings. With regard to the latter, Respondent argues that he

could not afford counsel and had little or no access to research materials or basic equipment; further, that his access to witnesses was limited.

This Court, in The Florida Bar v. Winn, 593 So.2d 1047 (Fla. 1992), specifically held that there is no right to counsel at public expense in bar disciplinary proceedings as the accused attorney can provide self-representation. Moreover, the Court stated that since Winn was a trained attorney, they could not conclude that he had been deprived of the ability to prepare a case; the same contention Respondent makes in the instant case. The Court further noted that Winn had requested and received a copy of the Rules Regulating The Florida Bar and could have moved the Court for additional materials if he required them. In the instant case, the Referee provided the Respondent with time to provide case law if he so wished. (T. 89). The Respondent indicated he wanted the Bar to provide him with their cases and the Bar agreed. (T. 89-90). Respondent also stated there were persons whom he would ask “on the outside” to assist him in his research. (T. 89).<sup>4</sup> Finally, there is simply no right of entitlement to computer or typewriting equipment.

Respondent next argues that the regulations of the United States Bureau of Prisons prohibited or limited Respondent’s ability to communicate with witnesses.

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<sup>4</sup> Moreover, given Respondent’s 3 prior disciplines, one would assume that he has some familiarity with the Rules Regulating The Florida Bar and the disciplinary process in general.

While the Respondent is correct in asserting that the first scheduled final hearing was cancelled, he misstates the facts by stating that there was insufficient time to notice the witnesses for the rescheduled date. In fact, only one of his witnesses did not appear at the final hearing. Moreover, the record is clear that the Respondent had spoken multiple times with that witness whose absence he now takes issue with.

THE REFEREE:

So I'm certainly willing to wait a little bit if you (Respondent) believe that these witnesses are on their way.

RESPONDENT:

I think Miss Range *assured* me that she would be there (Respondent is participating by telephone from prison) and so did Mr. Hardemon and I expect that they would be there.

(T. 10; lines 7-13.)

In fact, Miss Range, the one witness that did not appear, "assured" the Respondent that she would testify. From the Respondent's statements on the record, it is obvious that the absence of his witness is not the result of unfair or prejudicial procedure, but rather the witness' simple failure to attend. Moreover, the record is devoid of any objection concerning inadequate time to secure the testimony of witnesses on Respondent's behalf. Consequently, this argument appears to be an attempt to curry sympathy with this Court.

Finally, Respondent contends that the Referee erred by allowing the Bar to introduce his twenty-five page indictment despite the fact that Respondent was found guilty of only one count and further, by allowing the Bar to introduce evidence regarding Respondent's sentencing documents without testimony. In fact, the indictment is an exhibit to the Bar's Complaint. The Complaint accurately alleged that Respondent was convicted of only one felony count within the indictment. The Referee correctly allowed the introduction of the entire document in order to provide necessary background for the count on which the Respondent was found guilty. (T. 36). With regard to the sentencing documents; i.e., the Bond Recommendation, Penalty, Imprisonment and Supervised Release Terms, it is a mystery why Respondent makes the argument. Clearly, Respondent's sentence was relevant to the Referee's consideration of the matter before her. The fact that the Bar's case was predicated on the single count of the indictment that resulted in his conviction does not diminish the relevancy of the sentence.

As evidenced by the foregoing, the Referee's rulings were fair and correct and in accordance with law and thus, should be upheld.

## ARGUMENT II

### **THE REFEREE'S RECOMMENDATION OF DISBARMENT IS APPROPRIATE AND SHOULD BE UPHELD.**

As this Court stated in The Florida Bar v. Vining, 761 So.2d 1044, 1048

(Fla. 2000):

The Court's scope of review of a referee's recommended discipline, however, is broader than that afforded to findings of fact because this Court has the ultimate responsibility to determine the appropriate sanction. *See The Florida Bar v. Niles*, 644 So.2d 504, 506 (Fla. 1994). Yet, the Court "will not second-guess a referee's recommended discipline so long as that discipline has a reasonable basis in existing case law." The Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla. 1997). (Emphasis added).

The referee should be upheld when the applicable standards justify the sanction. The Florida Bar v. Wolis, 783 So.2d 1057 (Fla. 2001).

Neither the law nor the profession should lose sight of the obligation of every lawyer to conduct himself in a manner which will cause laymen, and the public generally, to have the highest respect for and confidence in the members of the legal profession. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). Any conduct of an attorney which brings the administration of justice into scorn and disrepute demands condemnation and the application of appropriate penalties. The Florida Bar v. Calhoon, 102 So.2d 604 (Fla. 1958).

The only issue to be determined at final hearing was that of appropriate discipline to be imposed. The discipline recommended by the Referee has a

reasonable basis in case law and the applicable standards and thus, should be upheld.

The thrust of Respondent's argument with regard to the discipline recommendation seems to be that he was subjected to an automatic disbarment. That is not true. What is true is that Respondent was provided with a hearing at which he was afforded the right to be heard, to present witnesses, and to present argument. The fact that he was unable to overcome a presumption of disbarment in no way means that his sanction was automatic.<sup>5</sup>

In The Florida Bar v. Cueto, 834 So.2d 152 (Fla. 2002), this Court disbarred a lawyer who paid kickbacks to a county claims adjuster in exchange for allowing his cases to proceed through the system. The lawyer pled guilty to one count of unlawful compensation, a third degree felony, and was sentenced to 5 years probation with no incarceration. In reaching its decision to disapprove the referee's recommendation of a 3 year suspension and instead disbar the respondent, this Court stated:

We conclude that in knowingly and "corruptly" participating in this scheme to circumvent the proper function of the legal system, Cueto failed to adhere to the high principles demanded of attorneys. He acted with dishonesty towards the very system he was sworn to uphold. Because Cueto's conduct violated the basic tenet that lawyers must act in a manner that is not unlawful or contrary to honesty and justice, we disapprove

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<sup>5</sup> The Florida Bar v. Bustamante, 662 So.2d 687 (Fla. 1995).

the referee's recommendation and find Cueto guilty of violating rule 4-8.4(c).

Cueto, at 156.<sup>6</sup>

These sentiments can just as appropriately be applied to the Respondent in the instant case. His crime, bribery of a local official, evidences the same core character and professional failures as evidenced in Cueto.

In The Florida Bar v. Wolis, 783 So.2d 1057 (Fla. 2001), the respondent was similarly disbarred following his felony conviction for obstruction of justice in connection with SEC proceedings which could have potentially resulted in his financial gain. This Court stated:

This conduct was not only serious but also had the underpinnings of being directed to financial gain. This conduct is especially serious when combined with the felony conviction and certainly warrants disbarment.

Id. at 1060.

In The Florida Bar v. Rendina, 583 So.2d 314 (Fla. 1991), an attorney was disbarred for attempting to bribe a State Attorney in order to obtain a lesser sentence for his client. The lawyer had pled guilty to the charge of conspiracy to commit unlawful compensation and like our Respondent, was found guilty by the referee of conduct involving dishonesty. Similarly, the respondent in The Florida Bar v. Nedick, 603 So.2d 502 (Fla. 1992) was disbarred following his guilty plea

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<sup>6</sup> In the instant case, summary judgment was entered as to Respondent's guilt of Rules 3-4.3 and 4-8.4(a)(b)(c) of the Rules Regulating The Florida Bar.

to charges of income tax evasion. In disbaring him, the Court found his crime involved moral turpitude, perjury and conspiracy with the only motive being pecuniary gain.

In the instant case, Respondent was found guilty of a federal felony of bribery of a public official and sentenced to 27 months in prison. As a Miami-Dade County Commissioner, Respondent knowingly and corruptly accepted approximately \$100,000.00 for his personal gain in exchange for business transactions. Respondent's misconduct is surely analogous to the foregoing cases.

In his Brief, Respondent attempts to distort the basis for the Referee's recommendation of disbarment by claiming that "the complainant's case and referee's recommendations are based on 'automatic disbarment' for some public officials in high publicity cases". (Respondent's Brief, p.22). Respondent's argument is disingenuous. The presumption of disbarment for felony convictions is either overcome or upheld by mitigating and/or aggravating evidence.

Respondent has failed to overcome the presumption with his meager mitigation.

In The Florida Bar v. Wilson, 643 So.2d 1063 (Fla. 1994), the referee found the respondent guilty of violating Rules 3-4.3 and 4-8.4(b) and (c) of the Rules Regulating The Florida Bar; the same rules the Respondent in the instant case was found guilty of. The referee in Wilson also found the following mitigating factors: absence of a prior disciplinary record, good character and reputation in the

community, imposition of other sanctions in that he had already been sentenced to probation in another forum, and remorse. Aggravating factors included dishonest or selfish motive, pattern of misconduct, vulnerability of the victim, and substantial experience in practice of law. The referee concluded that the aggravating circumstances were more compelling than the mitigating circumstances, and that the substantial character evidence was not sufficient to overcome clear and convincing evidence that Wilson had committed two serious felonies involving theft of public Medicaid money. Accordingly, the referee recommended disbarment. The referee's determination that a "serious" felony had been committed was approved by this Court in connection with the finding that the mitigation, including good character, was not sufficient to warrant a penalty less than the presumed sanction of disbarment.

In *Wolis*, supra, this Court pointed out that the referee's findings as to aggravation will be treated as a factual matter and upheld if there is competent substantial evidence.

The Bar presented the following aggravating factors:

- 9.22(a) prior discipline (In 1988, Respondent received a 90 day suspension. In 1991, Respondent received a 91 day suspension. Subsequently, in 1996, Respondent was suspended for 30 days.);<sup>7</sup>

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<sup>7</sup> Additionally, this Court has repeatedly stated that it deals more severely "with cumulative misconduct and multiple instances of misconduct". The Florida Bar v. Solomon, 338 So.2d 818 (Fla. 1976).

- 9.22 (b) dishonest or selfish motive;
- 9.22 (c) a pattern of misconduct;
- 9.22 (d) multiple offenses;
- 9.22 (g) refusal to acknowledge the wrongful nature of conduct;
- 9.22 (i) substantial experience in the law in that Respondent was admitted to practice law in 1973.

The Respondent argued in mitigation his reputation, especially in the African-American community. Respondent had character witness Hardemon testify. Hardemon was a co-defendant in the indictment, but was found not guilty. Hardemon testified at trial that he was Respondent's personal friend for over 30 years. (T. 44). Hardemon also testified as to Respondent's service to the African-American community. (T. 41). Respondent himself testified and discussed his background and extensive involvement in the African-American community.

The Referee considered Respondent's mitigation as set forth above. She also considered as mitigation the sanctions imposed upon him via his criminal sentencing. She specifically found the mitigation did not overcome her recommendation of disbarment. (ROR, p.3). Of particular note is the Referee's recognition of the fact that Respondent's wrongful conduct took place while he was a public official. The Referee noted that Respondent was in a unique position of power, influence, and public trust. She considered Respondent's actions in misusing his power and influence and its detrimental effect on the public trust.

The Referee found that Respondent's conduct was egregious in that he misused an elected position for the purpose of personal illegal gain. (ROR, p.2). There is no reason to believe that Respondent would have discontinued his conduct had he not been caught.

Applicable Florida Standards for Imposing Lawyer Sanctions include:

- 5.11 Disbarment is appropriate when:
  - (a) a lawyer is convicted of a felony under applicable law;
  - (b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft;
  - (f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
- 5.21 Disbarment is appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.
- 7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

There are three prongs to attorney discipline. It must be fair to the public, fair to the respondent, and yet severe enough to deter others from committing

similar violations. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). Given the seriousness of Respondent's crime and felony conviction, his involvement in corruption of the system he was sworn to uphold, and his violation of the public trust for his own pecuniary benefit, the only appropriate sanction is the most serious sanction of disbarment.<sup>8</sup> As the Referee so aptly stated:

The practice of law is a privilege and demands a greater acceptance of responsibility and adherence to ethical standards than Respondent has demonstrated.

(ROR, p.2).

As the recommendation of disbarment has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions, Respondent's disbarment should be affirmed.

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<sup>8</sup> The same would be true even if Respondent had not been suspended 3 times in the past for ethical violations.

## **CONCLUSION**

Respondent has failed to establish the existence of error. The findings of fact are supported by the evidence and the recommendation of disbarment is appropriate as evidenced by both the case law and Florida Standards for Imposing Lawyer Sanctions. Thus, the Referee's recommendation of disbarment should be affirmed.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Reply Brief was forwarded via Airborne Express, airbill no. 3370014222, to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to James C. Burke, Sr., Respondent, at 2700 N.W. 56<sup>th</sup> Avenue, Unit 421, Lauderhill, Florida 33313, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, on this \_\_\_\_\_ day of July, 2004.

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**VIVIAN MARIA REYES**  
**Bar Counsel**

**CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN**

I HEREBY CERTIFY that the Answer Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

\_\_\_\_\_  
**VIVIAN MARIA REYES**  
**Bar Counsel**