No.: 20 _____

In the

Supreme Court of the United States

EARL MAYBERRY JOHNSON JR.,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Petition to the
Florida Supreme Court

APPENDIX TO WRIT OF CERTIORARI

Earl Mayberry Johnson Jr., J.D.
Petitioner, Pro Se
525 3rd Street North, #305
Jacksonville Beach, Florida 32250
(904) 525-2479
EarlMayberryJohnson@gmail.com

April 8, 2020

APPENDIX TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS - Continued

DECLARATION OF SERVICE

I HEREBY DECLARE under penalty of perjury that the foregoing Appendix to Writ of Certiorari was furnished upon Carlos Leon, Esq., Attorney for the Respondent, via U.S. Mail, Postage Prepaid, 541 East Jefferson Street, Tallahassee, FL 32399, this April 8, 2020.

Earl Mayberry Johnson Jr., J.D.
Petitioner, Pro Se
Executed April 8, 2020

Supreme Court of Florida

THURSDAY, JULY 11, 2019

CASE NOS.: SC18-32 & SC18-1168
Lower Tribunal No(s).:
2017-00,465(4B), 2018-00,345 (4B)

THE FLORIDA BAR vs. EARL MAYBERRY JOHNSON, JR.

Complainant(s) Respondent(s)

The uncontested report of the referee in SC18-32, filed September 28, 2018, is approved and respondent is suspended from the practice of law for six months. Additionally, the uncontested report of referee in SC18-1168, filed January 22, 2019, is approved and respondent is suspended from the practice of law for one year. Respondent's suspension shall be effective thirty days from the date of this order so that respondent can close out his practice and protect the interests of existing clients. If respondent notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Respondent shall fully comply with Rule Regulating the Florida Bar 3-5.1(h). In addition, respondent shall accept no new business from the date this order is filed until he is reinstated.

Respondent shall pay restitution in the amount of $2,090.00 to Angela Berry under the terms and conditions set forth in the report filed in SC18-1168.

Respondent is further directed to comply with all other terms and conditions of the reports.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Earl Mayberry Johnson, Jr., in the amount of $7,215.76, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined. The filing of a motion for rehearing shall not alter the effective date of this suspension.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, LAGOA, LUCK, and MUÑIZ, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

as
Served:
CARLOS ALBERTO LEON
EARL MAYBERRY JOHNSON, JR.
HON. BRYAN A. FEIGENBAUM, JUDGE
ALLISON CARDEN SACKETT

IN THE
SUPREME COURT OF FLORIDA

Consolidated Cases
CASE NO.: SC18-32
CASE NO.: SC18-1168

THE FLORIDA BAR,
Complainant,
v.
EARL MAYBERRY JOHNSON JR.,
Respondent.
On Review from Reports of Referee

RESPONDENT'S EMERGENCY MOTION TO EXTEND PRE-SUSPENSION WINDDOWN PERIOD BASED UPON MEDICAL INCAPACITY

EARL M JOHNSON, JR., ESQ.
Florida Bar No. 006040
Email: jaxlawfl@aol.com
Post Office Box 40091
Jacksonville, FL 32203
Tel: (904)356-5252
Respondent, *Pro Se*

COMES NOW the Respondent, Earl M. Johnson Jr., and pursuant to Fla. R. App. P. 9.310 (a), moves this Honorable Court to extend pre-suspension period set by the July 11, 2019 Order suspending Respondent only, based upon Respondent's spinal surgery August 1, 2019 and his temporary medical incapacity therefrom and, in support thereof, states:

On July 11, 2019, the Court entered an Order, among other things, suspending Respondent from the practice of law effective 30 days thereof, on or about August 11, 2019.

On July 31, 2019 Respondent was admitted to Mayo Clinic for emergency surgery to his spinal column – a discectomy at L3-4. Respondent's treating neurosurgeon has placed Respondent on a three (3) week no work order. Ex. A. (Dr. Grenwal letter, dated August 2, 2019).

Respondent's medical condition has hampered and delayed efforts during the pre-suspension period, meant to protect the interests of clients. In addition to the period leading to surgery, the 3 week no work period extends approximately two (2) weeks beyond the date of suspension. *Id.*

WHEREFORE based upon the foregoing, Respondent respectfully requests that the pre-suspension period be extended by 60 days to allow for the undersigned

to recuperate from surgery, as ordered by the treating neurosurgeon and to allow for the protection of client's interests as contemplated by the July 11, 2019 order.[1]

CERTIFICATION OF COUNSEL

I hereby certify that on July 30, 2019, the undersigned telephoned counsel for the bar, Carlos Leon and left a voice mail requesting the Bar position on the instant motion and that there is no response as of the time of filing.

Respectfully Submitted,

/s/ Earl M. Johnson, Jr.
EARL M JOHNSON, JR., ESQ.
Florida Bar No. 006040
Email: jaxlawfl@aol.com
Post Office Box 40091
Jacksonville, FL 32203
Tel: (904)356-5252
Respondent

CERTIFICATE OF COMPLIANCE

The undersigned certifies that on or about July 31, 2019 the undersigned emailed counsel for the bar concerning the instant motion by the Bar objects. Ex. B.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been furnished to CARLOS A. LEON, Esq., via electronic service, on August 5, 2019.

/s/ Earl M. Johnson Jr.
Respondent

[1] This emergency request is in addition to the previously filed motion to stay pending petition for certioarai.

MAYO CLINIC
4500 San Pablo Road
Jacksonville, Florida 32224

904-953-2000
mayoclinic.org

Sanjeet Grewal MD
4500 San Pablo RD
Jacksonville, FL 32224

August 2, 2019
RE: Earl M. Johnson
DOB: 8/19/1965

To Whom It May Concern:

Earl Johnson was seen in my clinic on 7/31/2019 at Mayo Clinic Jacksonville. This letter is to certify that Earl Johnson may not return to work until seen at his post operative appointment in 3 weeks. He has had recent surgery and this will interfere with his daily activities at work.

Signed: _____
Sanjeet Grewal MD
Daniel Nobles, APRN
Mayo Clinic Hospital, Fifth Floor
4500 SAN PABLO RD S
JACKSONVILLE FL 32224-1865

Signed on 08/02/19 at 11:00 AM

From: Leon, Carlos A <cleon@floridabar.org>
To: Earl M. Johnson Jr., Esq. <jaxlawfl@aol.com>
Subject: RE: sc18-32; motion to extend wind-down period based upon emergency back surgery
Date: Fri, Aug 2, 2019 7:50 am

Good Morning Mr. Johnson: I'm sorry to hear about your medical condition and I hope and pray everything turns out well. But, I regret, TFB is not able to agree to any extensions.

If there is anything that I can help you with, though, please do let me know.

Thank you.

Carlos A. León | Bar Counsel
Tallahassee Branch | Lawyer Regulation
Phone: 850-561-5696 | Fax: 850-561-9419

E-Mail: cleon@floridabar.org

The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300

www.floridabar.org

From: Earl M. Johnson Jr., Esq. <jaxlawfl@aol.com>
Sent: Thursday, August 01, 2019 10:38 AM
To: Leon, Carlos A <cleon@floridabar.org>
Subject: sc18-32; motion to extend wind-down period based upon emergency back surgery

Mr. Leon,

Yesterday I was admitted to Mayo Clinic for emergency surgery to my spine today.

I am requesting the Bar's position on an extension of the wind-down period by 60 days based upon my incapacity prior to and after surgery (notwithstanding the motion to stay pending petition).

Sincerely,

Earl Johnson

*BOLD CITY LAW GROUP LLC**

EARL M. JOHNSON, JR. ESQ.

ATTORNEY AT LAW

POST OFFICE BOX 40091 | JACKSONVILLE, FL | 32203

904.356.5252 Telephone

jaxlawfl@aol.com Email Address

*** Martindale-Hubble Awards Only 4% of Listed Attorneys**

Please note: Florida has very broad public records laws. Many written communications to or from The Florida Bar regarding Bar business may be considered public records, which must be made available to anyone upon request. Your e-mail communications may therefore be subject to public disclosure.

Supreme Court of Florida

MONDAY, SEPTEMBER 16, 2019

CASE NOS.: SC18-32 & SC18-1168
Lower Tribunal No(s).:
2017-00,465(4B), 2018-00,345 (4B)

THE FLORIDA BAR vs. EARL MAYBERRY JOHNSON, JR.

Complainant(s) Respondent(s)

Respondent's "Motion to Stay Pending Petition for Certiorari to the United States Supreme Court Alternatively, Motion to Extend Pre-Suspension Winddown Period" and "Emergency Motion to Extend Pre-Suspension Winddown Period Based Upon Medical Incapacity" are hereby denied.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and LAGOA, JJ. concur. LUCK, and MUÑIZ, JJ., would deny the stay, but grant a 30-day extension of the wind-down period.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

as
Served:
CARLOS ALBERTO LEON
EARL MAYBERRY JOHNSON, JR.
PATRICIA ANN TORO SAVITZ

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

EARL MAYBERRY JOHNSON JR.,

Respondent.

_____/

Supreme Court Case No.

The Florida Bar File No.
2020-00,093(4B)OSC

PETITION FOR CONTEMPT AND ORDER TO SHOW CAUSE

The Florida Bar, petitioner, pursuant to Rule 3-7.7(g), petitions the Supreme Court of Florida to enter an order to show cause why respondent should not be held in contempt of this Court's Order entered in Supreme Court Case Numbers SC18-32 and SC18-1168 and disbarred. In support of this Petition, The Florida Bar states:

1. On July 11, 2019, in Supreme Court Case No. SC18-32, this Court suspended respondent for six months. Additionally, on that same date, in Supreme Court Case No. SC18-1168, this Court suspended respondent for one year.

2. As a result of this Court's Orders, respondent's suspension became effective on August 12, 2019.

COUNT I

3. On August 12, 2019, respondent filed in the Circuit Court of Orange County "Respondent's Motion for Relief from August 9, 2019 Order Based Upon the Undersigned' [sic] Emergency Surgery and Temporary Medical Incapacitation Under Oath."

4. In his motion, respondent attempts to explain to that court that his failure to appear at an August 8, 2019, hearing, in Orange County Circuit Court case number 2003-DR-017887.

5. At no time did respondent inform the Orange County Circuit Court, or any either of the parties, including his client, that he had been suspended from the practice of law effective August 12, 2019.

6. As a result of the foregoing, on August 19, 2019, the Bar wrote a letter to respondent, sent to respondent's record Bar e-mail address, asking for his response to the inquiry regarding his motion.

7. The Bar requested a response by September 3, 2019. A copy of the letter is attached hereto as Exhibit "A."

8. On August 19, 2019, the Bar received respondent's auto response indicating he was on medical leave and would return on August 26, 2019.

9. Respondent's auto-response made no mention of his suspension. A copy of respondent's auto-response e-mail is attached hereto as Exhibit "B."

10. Thereafter, respondent failed to respond to the Bar's inquiry.

11. On September 9, 2019, the Bar again wrote to respondent, via a letter sent to respondent's record Bar e-mail address. In that correspondence, the Bar requested a response by September 20, 2019. A copy of the Bar's letter is attached hereto as Exhibit "C."

12. The e-mail transmitting the Bar's September 9, 2019, letter is attached hereto as Exhibit "D."

13. To date, respondent has failed to respond or to make any effort to contact The Florida Bar regarding this matter.

COUNT II

14. In the order of suspension in Supreme Court Case No. SC18-32, respondent was ordered to comply with R. Regulating Fla. Bar 3-5.1(h) by notifying his clients, opposing counsel and tribunals of his suspension and providing The Florida Bar within 30 days of his suspension a sworn affidavit listing the names and addresses of all persons and entities that were furnished a copy of the suspension order.

15. On July 15, 2019, The Florida Bar notified respondent of the conditions associated with his suspension to his record Bar address and email, specifically the requirement that he submit the sworn affidavit pursuant to Rule 3-5.1(h). The letter was returned to sender. The July 15, 2019, letter and email from

The Florida Bar to respondent and returned letter are attached hereto as Composite Exhibit "E."

16. On July 17, 2019, The Florida Bar again notified respondent of the conditions associated with his suspension to his record Bar address and email, specifically the requirement that he submit the sworn affidavit pursuant to Rule 3-5.1(h). The letter was returned to sender. The July 17, 2019, letter and email from The Florida Bar to respondent and returned letter are attached hereto as Composite Exhibit "F."

17. On August 14, 2019, The Florida Bar notified respondent of his noncompliance with the conditions of his suspension to his record Bar address and email, specifically his failure to submit the sworn affidavit pursuant to Rule 3-5.1(h). The letter was returned to sender. The August 14, 2019, letter and email from The Florida Bar to respondent and returned letter are attached hereto as Composite Exhibit "G."

18. Respondent has not submitted the required affidavit containing a list of persons/entities to which he gave notice of his suspension and provided a copy of the order of suspension.

19. Consequently, The Florida Bar is unaware whether respondent notified any clients, opposing counsel and tribunals of his suspension pursuant to Rule 3-5.1(h).

COUNT III

20. In the order of suspension in Supreme Court Case No. SC18-1168, respondent was ordered to comply with R. Regulating Fla. Bar 3-5.1(h) by notifying his clients, opposing counsel and tribunals of his suspension and providing The Florida Bar within 30 days of his suspension a sworn affidavit listing the names and addresses of all persons and entities that were furnished a copy of the suspension order.

21. On July 15, 2019, The Florida Bar notified respondent of the conditions associated with his suspension to his record Bar address and email, specifically the requirement that he submit the sworn affidavit pursuant to Rule 3-5.1(h). The letter was returned to sender. The July 15, 2019, letter and email from The Florida Bar to respondent and returned letter are attached hereto as Composite Exhibit "H."

22. On August 14, 2019, The Florida Bar notified respondent of his noncompliance with the conditions of his suspension to his record bar address and email, specifically his failure to submit the sworn affidavit pursuant to Rule 3-5.1(h). The letter was returned to sender. The August 14, 2019, letter and email from The Florida Bar to respondent and returned letter are attached hereto as Composite Exhibit "I."

23. Respondent has not submitted the required affidavit containing a list of persons/entities to which he gave notice of his suspension and provided a copy of the order of suspension.

24. Consequently, The Florida Bar is unaware whether respondent notified any clients, opposing counsel and tribunals of his suspension pursuant to Rule 3-5.1(h).

25. Due to respondent's non-compliance with this Court's order dated July 11, 2019, The Florida Bar was obligated to file this Petition for Contempt for noncompliance.

26. The other members of The Florida Bar should not have to pay for respondent's noncompliance with this Court's order and the instant proceeding. Therefore, the Bar is requesting administrative costs of $1,250.00 against respondent.

WHEREFORE, The Florida Bar, respectfully requests this Court enter its Order compelling Respondent to show cause why he should not be held in contempt of this Court's Order and disbarred.

Respectfully submitted,

Carlos Alberto Leon, Bar Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 98027
cleon@floridabar.org

CERTIFICATE OF SERVICE

I certify that this document has been e-filed with the Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, with a copy provided via portal email to Respondent, jaxlawfl@aol.com, with another copy to Respondent, whose record Bar address is P.O. Box 40091, Jacksonville, Florida, 32203-0091, via United States Mail, Certified Mail No. 7017 1450 0000 7821 0070, return receipt requested, and to Patricia Ann Toro Savitz, Staff Counsel, psavitz@floridabar.org, on this 4th day of October 2019.

Carlos Alberto Leon, Bar Counsel

NOTICE OF TRIAL COUNSEL AND DESIGNATION OF PRIMARY EMAIL ADDRESS

PLEASE TAKE NOTICE that the trial counsel in this matter is Carlos Alberto Leon, Bar Counsel, whose address, telephone number, and primary email address are The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida, 32399-2300, (850)561-5845, cleon@floridabar.org. Respondent need not address pleadings, correspondence, etc., in this matter to anyone other than trial counsel and to Patricia Ann Toro Savitz, Staff Counsel, The Florida Bar, 651 E Jefferson Street, Tallahassee, Florida, 32399-2300, psavitz@flabar.org.

Supreme Court of Florida

MONDAY, OCTOBER 7, 2019

CASE NO.: SC19-1695
Lower Tribunal No(s).:
2020-00,093(4B)OSC

THE FLORIDA BAR vs. EARL MAYBERRY JOHNSON, JR.

Petitioner(s) Respondent(s)

The Florida Bar having filed its Petition for Contempt and Order to Show Cause, this is to command you, Earl Mayberry Johnson, Jr., to show cause on or before October 22, 2019, why you should not be held in contempt of this Court or other discipline imposed for the reasons set forth in The Florida Bar's Petition. The Florida Bar may serve its reply on or before November 1, 2019.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

as
Served:

CARLOS ALBERTO LEON
EARL MAYBERRY JOHNSON, JR.
PATRICIA ANN TORO SAVITZ

IN THE CIRCUIT COURT IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2003-DR-017887

DANIALE S. YOUNG,

Petitioner,

Vs.

DANIEL K. WOOLFORK,

Respondent.

_____/

NOTICE TO COURT AND MOTION TO ALLOW WITHDRAWAL AS COUNSEL AND FOR 30 DAY STAY TO ALLOW FOR APPEARANCE OF NEW COUNSEL

COMES NOW the undersigned and provides notice to the Court and moves to withdraw as counsel for Respondent and for a 30 day stay to allow for the appearance of new counsel and, in support, states:

1) The undersigned has been suspended from the practice of law for a period of 1 year beginning August 11, 2019. Ex. (Order).
2) Consequently, the undersigned moves to withdraw as counsel.
3) So as to not work injustice to the affected client, the undersigned further moves for a 30 day stay to allow for the appearance of new counsel, if any.
4) The balancing of interests and the ends of justice merit the stay.
5) A copy of the instant notice and motion has been furnished to the client/client representative.

WHEREFORE the undersigned prays that this Court will grant the motion to withdraw as counsel and allow a 30-day stay to allow for the appearance of new counsel, and for any other relief deemed reasonable and necessary by the Court.

Respectfully Submitted,
Earl M. Johnson, Jr.

/s/ Earl M Johnson Jr.
Earl M. Johnson, Jr.
Florida Bar Number 006040
Email: jaxlawfl@aol.com
Post Office Box 40091
Jacksonville, FL 32203
904.356.5252 (Telephone)

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been furnished via eService to Counsel of Record via eService; Daniel Woolfork, woolforkpr@yahoo.com, this October 7, 2019.

/s/ Earl M. Johnson Jr.
Earl M. Johnson, Jr.

Supreme Court of Florida

THURSDAY, JULY 11, 2019

CASE NOS.: SC18-32 & SC18-1168
Lower Tribunal No(s).:
2017-00,465(4B), 2018-00,345 (4B)

THE FLORIDA BAR vs. EARL MAYBERRY JOHNSON, JR.

Complainant(s) Respondent(s)

The uncontested report of the referee in SC18-32, filed September 28, 2018, is approved and respondent is suspended from the practice of law for six months. Additionally, the uncontested report of referee in SC18-1168, filed January 22, 2019, is approved and respondent is suspended from the practice of law for one year. Respondent's suspension shall be effective thirty days from the date of this order so that respondent can close out his practice and protect the interests of existing clients. If respondent notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Respondent shall fully comply with Rule Regulating the Florida Bar 3-5.1(h). In addition, respondent shall accept no new business from the date this order is filed until he is reinstated.

Respondent shall pay restitution in the amount of $2,090.00 to Angela Berry under the terms and conditions set forth in the report filed in SC18-1168.

Respondent is further directed to comply with all other terms and conditions of the reports.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Earl Mayberry Johnson, Jr., in the amount of $7,215.76, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined. The filing of a motion for rehearing shall not alter the effective date of this suspension.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, LAGOA, LUCK, and MUÑIZ, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

as
Served:
CARLOS ALBERTO LEON
EARL MAYBERRY JOHNSON, JR.
HON. BRYAN A. FEIGENBAUM, JUDGE
ALLISON CARDEN SACKETT

IN THE SUPREME COURT OF FLORIDA

EARL MAYBERRY JOHNSON JR.,

Respondent.

_____/

RESPONDENT'S NOTICE OF COMPLIANCE

Respondent hereby provides notice to the Court that the undersigned has provided notice of suspension to clients and courts, also providing copies of the Order of July 11, 2019.

Respectfully Submitted,

/s/ Earl M. Johnson, Jr.
Earl M. Johnson Jr., *Pro Se*
Florida Bar Number 006040
Email: jaxlawfl@aol.com
Post Office Box 40091
Jacksonville, FL 32203
904.356.5252 (telephone)
Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to CARLOS ALBERTO LEON, Bar Counsel, via cleon@flabar.org., on October 8, 2019.

/s/ Earl M. Johnson, Jr.
Earl M. Johnson Jr.

From: Earl M. Johnson Jr., Esq. <jaxlawfl@aol.com>
To: cleon <cleon@flabar.org>
Subject: Notice of Compliance, Former client/court list suspension notice information
Date: Tue, Oct 8, 2019 11:03 am

Dear Mr. Leon,

The following is a listing of clients and courts that have been provided a copy of the order of suspension:

Damien Santana and Andrea Renfro daimien.santana@yahoo.com
Saul and Danielle Gaspareto saulogaspareto@outlook.com
Monica Dennis; Deborah Dennis debbie.dennis@amerisbank.com
Dominic Jacobellis, ridebeachside@gmail.com
Brent Johnson burntfort2008@gmail.com
Emotorcars, Inc. donaldbell@aol.com
Robert Santos 7225 Holiday Hill Court, Jacksonville, FL 32216
Ziyard Nuhuman, ziyard_kandy@yahoo.com
Sean Hall, seanhall@gmail.com
Naomi Summers 51 W. 2nd St. Jacksonville, FL 32206
Jonathan Rodriguez, 2364 Elsner Dr., Jacksonville, FL 32218
Nick Chesser and Frank Chesser ncchesse@yahoo.com
Shannon Clark, shannonclark234@yahoo.com,
Daniel Woolfork, woolforkpr@yahoo.com
Michael Devaughn, mcdevaughn@hotmail.com
Terrance Adams, adams1498@yahoo.com

Courts:

Judge Boyer, 2019CA3783; 2016CA1081; 2018CA8645; 2018CA007323 (Duval); gerid@coj.net
Judge Cox 2011DR002391; 2011DR000581 (Clay); gonzalezd@clayclerk.com
Judge Ferguson 2017SC6593 (Duval); 501 West Adams St., Jacksonville, FL 32202
Judge Mobley 2016CT001675,(Clay); bishopm@clayclerk.com
1st DCA 1D18-3562
Judge Cole, 2014DR 000354; 2016CA7596 (Duval); kbend@coj.net
Judge Healy, 2015-DR-001533 (Duval); bpowell@coj.net
Judge Kelly, 2019-cc-032673 (Volusia); kmatejka@circuit7.0rg
Judge Blechman 2003DR017887 (Orange); ctjatm1@ocnjcc.org
Judge Blazs 2016CA2648 (Duval); belrod@coj.net
Judge Whittington 2014CP000162 (Clay); durchaml@clay.com
Judge Fahlgren 2017CA00249 (Nassau); astrickland@nassauclerk.com

EARL M. JOHNSON, JR.
POST OFFICE BOX 40091 | JACKSONVILLE, FL | 32203
904.356.5252 Telephone
jaxlawfl@aol.com Email Address

Supreme Court of Florida

MONDAY, NOVEMBER 18, 2019

CASE NO.: SC19-1695
Lower Tribunal No(s).:
2020-00,093(4B)OSC

THE FLORIDA BAR vs. EARL MAYBERRY JOHNSON, JR.

Petitioner(s) Respondent(s)

This is before the Court on The Florida Bar's Petition for Contempt and Order to Show Cause.

The Court having issued its Order to Show Cause to respondent and respondent having failed to file a response to said Order to Show Cause,

IT IS ORDERED that The Florida Bar's petition is granted and respondent is held in contempt of this Court's orders, dated July 11, 2019, in case numbers SC18-32 and SC18-1168. As a sanction, respondent is disbarred from the practice of law in the State of Florida. Respondent is currently suspended; therefore this disbarment is effective immediately. Respondent shall fully comply with Rule Regulating the Florida Bar 3-5.1(h).

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Earl Mayberry Johnson, Jr. in the amount of $1,250.00, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined. The filing of a motion for rehearing shall not alter the effective date of this disbarment.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, LAGOA and MUÑIZ, JJ., concur.
LUCK, J., would grant in part, and suspend respondent for two years.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

as
Served:

CARLOS ALBERTO LEON
EARL MAYBERRY JOHNSON, JR.
PATRICIA ANN TORO SAVITZ

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC19-1695

v.

TFB File No. 2020-00,093 (4B) OSC

EARL MAYBERRY JOHNSON, JR.,

Respondent.
_____/

MOTION FOR REHEARING (AMENDED)

COMES NOW the Respondent, EARL MAYBERRY JOHNSON, JR., by and through the undersigned counsel, and pursuant to Rule 9.330(a), Fla. R. App. P., files this amended motion for rehearing and states:

1. The Florida Bar filed a petition for contempt and order to show cause (Petition) in this case on October 0, 2019. In Count II, paragraph 18, of the Petition, the Bar asserts in reference to Supreme Court Case No. SC18-32 that "Respondent has not submitted the required affidavit containing a list of persons/entities to which he gave notice of his suspension and provided a copy of the order of suspension." The Bar makes the same assertion in Count III, paragraph 23, of the Petition in reference to Supreme Court Case No. SC18-1168.

2. On November 18, 2019, this Court entered an order disbarring Respondent for failing to file a response to the Order to Show Cause issued in this case. Respondent submits the Court has overlooked or misapprehended several points in reaching this decision.

3. The dockets in Supreme Court Case Nos. SC18-32 and SC18-1168 reflect that on October 08, 2019, Respondent filed a Notice of Compliance stating Respondent "has provided notice of suspension to clients and courts, and has provided copies of the Order of July 11,

2019." On the same date, Respondent sent an e-mail to Carlos Leon, bar counsel, providing "a listing of clients and courts that have been provided a copy of the order of suspension". (Exhibit A)

4. The dockets in this case, SC18-32 and SC18-1168 do not reflect that counsel for The Florida Bar ever informed the Court that Respondent had filed a Notice of Compliance.

5. Disbarment is "the ultimate penalty" in bar disciplinary matters. *See The Florida Bar v. McIver*, 606 So. 2d 1159, 1160 (Fla. 1992). Respondent asks this Court to set aside the order of disbarment entered November 18, 2019, and appoint a referee to hear the allegations set forth in The Florida Bar's Petition.

6. Petitioner filed a motion for rehearing on December 03, 2019, which inadvertently failed to attach Exhibit A. Exhibit A is attached to this amended motion.

WHEREFORE, Respondent requests this Court to grant a rehearing in this case and afford Respondent the requested relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal with copies furnished by e-mail to Carlos Alberto Leon at cleon@floridabar.org (primary e-mail) and to Patricia Ann Toro Savitz, Staff Counsel, at psavitz@floridabar.org this 04th day of December, 2019.

/s/ Richard A. Greenberg

Richard A. Greenberg
Florida Bar No. 0382371
E-mail: rgreenberg@rumberger.com (primary)
docketingorlando@rumberger.com and
rgreenbergsecy@rumberger.com (secondary)
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Attorneys for Respondent

From: Earl M. Johnson Jr., Esq. <jaxlawfl@aol.com>
To: cleon <cleon@flabar.org>
Subject: Notice of Compliance, Former client/court list suspension notice information
Date: Tue, Oct 8, 2019 11:03 am

Dear Mr. Leon,

The following is a listing of clients and courts that have been provided a copy of the order of suspension:

Damien Santana and Andrea Renfro daimien.santana@yahoo.com
Saul and Danielle Gaspareto saulogaspareto@outlook.com
Monica Dennis; Deborah Dennis debbie.dennis@amerisbank.com
Dominic Jacobellis, ridebeachside@gmail.com
Brent Johnson burntfort2008@gmail.com
Emotorcars, Inc. donaldbell@aol.com
Robert Santos 7225 Holiday Hill Court, Jacksonville, FL 32216
Ziyard Nuhuman, ziyard_kandy@yahoo.com
Sean Hall, seanhall@gmail.com
Naomi Summers 51 W. 2nd St., Jacksonville, FL 32206
Jonathan Rodriguez, 2364 Elsner Dr., Jacksonville, FL 32218
Nick Chesser and Frank Chesser ncchesse@yahoo.com
Shannon Clark, shannonclark234@yahoo.com,
Daniel Woolfork, woolforkpr@yahoo.com
Michael Devaughn, mcdevaughn@hotmail.com
Terrance Adams, adams1498@yahoo.com

Courts:

Judge Boyer, 2019CA3783; 2016CA1081; 2018CA8645; 2018CA007323 (Duval); gerid@coj.net
Judge Cox 2011DR002391; 2011DR000581 (Clay); gonzalezd@clayclerk.com
Judge Ferguson 2017SC6593 (Duval); 501 West Adams St., Jacksonville, FL 32202
Judge Mobley 2016CT001675,(Clay); bishopm@clayclerk.com
1st DCA 1D18-3562
Judge Cole, 2014DR 000354; 2016CA7596 (Duval); kbend@coj.net
Judge Healy, 2015-DR-001533 (Duval); bpowell@coj.net
Judge Kelly, 2019-cc-032673 (Volusia); kmatejka@circuit7.0rg
Judge Blechman 2003DR017887 (Orange); ctjatm1@ocnjcc.org
Judge Blazs 2016CA2648 (Duval); belrod@coj.net
Judge Whittington 2014CP000162 (Clay); durchaml@clay.com
Judge Fahlgren 2017CA00249 (Nassau); astrickland@nassauclerk.com

EARL M. JOHNSON, JR.

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Rumberger|Kirk

Richard A. Greenberg
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rgreenberg@rumberger.com
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December 23, 2019

Melissa M. Mara, CP, FRP
Certified Paralegal
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

VIA EMAIL AND U.S. MAIL

Re: The Florida Bar v. Earl Mayberry Johnson, Jr.
Case No.: SC19-1695

Dear Ms. Mara:

Attached you will find my client's affidavit in compliance with Rule 3-5.1(h). If you need any additional information, please contact me. Thank you for your consideration.

Sincerely,

Richard A. Greenberg

cc: Earl M. Johnson, Jr.

RAG:pds

STATE OF FLORIDA
COUNTY OF Duval

AFFIDAVIT

I, Earl Mayberry Johnson, Jr., after being duly sworn, say:

This affidavit is submitted pursuant to Rule 3-5.1(h) of the Rules of Discipline in conjunction with the decision in The Florida Bar v. Earl Mayberry Johnson, Jr., SC19-1695; The Florida Bar File No. 2020-00,093(4B)(OSC).

1. _____ I had no client(s) or matter(s) pending when the court order was served on me.

OR

2a. ✓ I have furnished a copy of the court order to all my clients with matters pending when the court order was served on me; and

2b. ✓ To all opposing counsel and co-counsel in the matters listed in 2a. above; and

2c. ✓ To all courts, tribunals, or adjudicative agencies before which I am counsel of record.

AND

3. ✓ I have notified all state (other than The Florida Bar), federal and administrative bars of which I am a member.

4. ✓ The names and addresses of all persons and entities that have been furnished with such notification are indicated on the attached list (Exhibit A), and such is a complete listing of all persons and entities notified pursuant to this rule.

FURTHER AFFIANT SAYETH NOT.

Earl Mayberry Johnson, Jr.

SWORN TO AND SUBSCRIBED before me this 19th day of [illegible] 2019

LAWSON SEAN BELCHER
MY COMMISSION #GG929322
EXPIRES: NOV 05, 2023
Bonded through 1st State Insurance

Notary Public

Print/type/stamp commission name of notary

Personally known to me or produced the following identification: Florida License

Return to:
Melissa M. Mara, CP, FRP
Certified Paralegal
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300

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Ziyard Nuhuman, ziyard_kandy@yahoo.com
Sean Hall, seanhall@gmail.com
Naomi Summers 51 W. 2nd St. Jacksonville, FL 32206
Jonathan Rodriguez, 2364 Elsner Dr., Jacksonville, FL 32218
Nick Chesser and Frank Chesser ncchesse@yahoo.com
Shannon Clark, shannonclark234@yahoo.com,
Daniel Woolfork, woolforkpr@yahoo.com
Michael Devaughn, mcdevaughn@hotmail.com
Terrance Adams, adams1498@yahoo.com

Courts:

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Judge Blazs 2016CA2648 (Duval); belrod@coj.net
Judge Whittington 2014CP000162 (Clay); durchaml@clay.com
Judge Fahlgren 2017CA00249 (Nassau); astrickland@nassauclerk.com

EARL M. JOHNSON, JR.
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Supreme Court of Florida

FRIDAY, JANUARY 10, 2020

CASE NO.: SC19-1695
Lower Tribunal No(s).:
2020-00,093(4B)OSC

THE FLORIDA BAR vs. EARL MAYBERRY JOHNSON, JR.

Petitioner(s) Respondent(s)

Respondent's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

as
Served:

CARLOS ALBERTO LEON
RICHARD ADAM GREENBERG
PATRICIA ANN TORO SAVITZ

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October 15, 2019 at 7:08 am
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TALLAHASSEE, FL 32399

Tracking History

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TALLAHASSEE, FL 32399
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October 14, 2019, 10:55 am

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October 14, 2019, 8:39 am
Arrived at Unit
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October 13, 2019
In Transit to Next Facility

October 10, 2019, 4:11 pm
Arrived at USPS Regional Facility
TALLAHASSEE FL DISTRIBUTION CENTER

October 9, 2019, 2:27 pm
Arrived at USPS Regional Facility
GAINESVILLE FL DISTRIBUTION CENTER

October 7, 2019, 2:57 am
Departed USPS Regional Facility
JACKSONVILLE FL DISTRIBUTION CENTER

October 5, 2019, 12:08 pm
Arrived at USPS Regional Facility
JACKSONVILLE FL DISTRIBUTION CENTER

October 4, 2019, 11:16 pm
Departed USPS Regional Facility
TALLAHASSEE FL DISTRIBUTION CENTER

October 4, 2019, 11:02 pm
Arrived at USPS Regional Facility
TALLAHASSEE FL DISTRIBUTION CENTER

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IN THE
SUPREME COURT OF FLORIDA

CASE NO.: SC18-32

THE FLORIDA BAR,

Complainant,

v.

EARL MAYBERRY JOHNSON JR.,

Respondent.

On Review from Report of Referee

RESPONDENT'S INITIAL BRIEF

EARL M JOHNSON, JR., ESQ.
Florida Bar No. 006040
Email: jaxlawfl@aol.com
Post Office Box 40091
Jacksonville, FL 32203
Tel: (904)356-5252
Respondent, *Pro Se*

TABLE OF CONTENTS[1]

[1] Trial transcript on review, hereinafter "TT _;" Referee's report hereinafter "RR __;" Bar exhibits hereinafter "Bar Ex. __; Respondent's Exhibits, hereinafter "Rpt Ex __."

TABLE OF CITATIONS

CASES

STATE STATUTES, RULES

STATEMENT OF THE CASE

The Florida Bar (hereinafter "Bar") filed a Complaint against the Respondent (hereinafter "undersigned") on January 5, 2018. The undersigned filed an Answer with a Motion to Dismiss. The motion to dismiss was denied; however, the Bar was granted leave to file an Amended Complaint, filed on May 4, 2018 and answered along with affirmative defenses.

Regarding undersigned' post-conviction representation of the complaining witness, Curtis Clemons (hereinafter "Mr. Clemons" or "complaining witness"), in the amended complaint, the Bar charged the undersigned with violating Rules Regulating the Florida Bar: 4-1.1 (Competence); 4-1.2 (Scope of Representation); 4-1.3 (Diligence); 4-1.4 (Communication); 4-1.5(a) (Excessive Fees); 4-8.4(a)

(Misconduct); and 4-8.4(c) (Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation). R 1, p. 7 (Amended Complaint).

On June 11, 2018, the Bar moved to have the complaining witness to testify via "Skype" videoconference at trial. Also, on June 11, 2018, the undersigned contested that motion, and filed a motion to bifurcate the proceedings into a liability phase and potential sanctions phase, and a motion to continue the trial due to the undersigned' former counsel's health. The motion to continue the trial was granted and the trial was set for August 2, 2018; motion to bifurcate denied.

On June 14, 2018, the undersigned' former counsel, Brett Geer, accused Bar counsel, Carlos A. Leon, of "misconduct" in a June 14, 2018 email from Mr. Greer to the referee: "As Your Honor noted at the hearing, a court reporter was present. I have been practicing nearly 30 years and have never seen any lawyer do this-let alone bar counsel." R. 4, (emphasis added). Mr. Geer complained that Mr. Leon unilaterally, sent an erroneous order to the referee without his knowledge: "in contravention of known principles of ethics, decorum, practice and professionalism. As if that were not bad enough, Mr. Leon included completely impertinent, self-serving 'findings' which the Court never found. He is, in effect, outing words in Your Honor's mouth ... Mr. Leon's proposed order is objectionable, and we object to it." R. 4 (emphasis supplied; added). The referee made no comment regarding the Bar's conduct.

At trial the Bar intentionally offered an altered and adulterated version of subject petition for belated appeal filed by the undersigned on behalf of the former client – the Bar's copy of the petition, offered as an exhibit, did not include the Oath of Petitioner executed by Mr. Clemons which appears in the original filed in the First District Court of Appeal. Compare R. 1 (Bar version without client oath) and R. 2 (the original filed copy with client oath).

The Report and Recommendation (hereinafter "RR") errs in asserting the Bar's exhibits were entered without objection (R. 5, p. 3); the undersigned objected to the Bar's redacted exhibit at trial and the referee acknowledged that the undersigned' original copy, with the Oath of Petitioner, was the version filed in the appellate court. The referee made no comment regarding the Bar's conduct of offering the adulterating material evidence exhibit at trial.

In the same trial, the Bar argued for a one-year suspension, although it offered a 60-day suspension before trial.

The referee excluded the character letters of Sean Hall and Chrystal Chisholm as untimely submitted.

Following the trial, on September 26, 2018, the Referee found the undersigned guilty of violating all charges.

The undersigned timely filed a motion for rehearing/new trial, before the referee, that was denied on November 5, 2018.

On November 26, 2018, the undersigned filed Respondent's Notice of Intent to Seek Review of Referee Report.

On December 18, 2018, the Court granted the undersigned leave through December 31, 2018 to file the initial brief in support of the review.

STATEMENT OF THE FACTS

A. Brief Introduction of Respondent

The undersigned has been a member of the Bar since 1994, with extensive and successful experience handling post-conviction matters which he testified, without contravention, can often can take years to adjudicate and successful experience recently practicing before the Florida Supreme Court.[2]

Approximately 17 years ago the undersigned entered into a consent judgment with the Bar, resulting in his retroactive 18-month suspension from the practice of law based upon incapacity for alcoholism. The undersigned was reinstated in December 2003, and successfully completed probation and the Florida lawyer assistance program. SC01-886; SC01-1940.

B. Complaining Witness Determined by Referee to Seriously Lack Credibility

Importantly, it cannot be overstated that the referee found the complaining witness, convicted felon Curtis Clemons (hereinafter "Mr. Clemons") gravely lacking in credibility:

[2] Lopez v. Hall, SC16-1921.

> At the outset, it should be noted that **the Referee has serious reservations regarding Mr. Clemon's credibility given the multitude of false statements Mr. Clemons provided** to the police ... and various statements he made in subsequent court filings. *See* Bar Exh. 1, *cf.* R's Exh. 5 (internal exhibits "E," (Deposition of Delores Haynes) and "F," (victim impact statement) ...

RR, p. 6 **(emphasis added).**

C. Nearly 200 Attorney-Client Communications Uncounted in RR

Rejecting over 200 client attorney-communications, the RR flatly finds "there was a deplorable lack of communication by the Respondent to Mr. Clemons ... " R. 5, p. 5 (emphasis added), which becomes the crux the findings of guilt.

Ms. Clemons however testified without contravention, that during the 6-year representation, she met approximately 30 times with the undersigned and another 5 times with the undersigned' staff, in order to relay those updates to Mr. Clemons.[3] TT. Ms. Clemons also testified that she or her husband averaged twice a month in status telephone calls with the undersigned, during the representation, meaning an approximate total of 144 times. TT. By Ms. Clemons unrefuted testimony alone,

[3] All witnesses, Ms. Clemons, Mr. Clemons, the affiant and the undersigned testified that, from the beginning of the representation, that in addition to direct communication, in view of his out-of-town prison incarceration, Mr. Clemons gave his parents express permission to directly communicate with the undersigned and staff about his case and that his parents would relay that information to Mr. Clemons via telephone conversations or visits in prison. TT.

she thus approximates 179 attorney communications during the representation for status updates for Mr. Clemons.

None of Ms. Clemons' critical testimony on client communications is mentioned in the RR.

The only salient testimony claiming a lack communication came from Mr. Clemons, who said that there were long periods of no communication (longest being about 4-5 months), that the undersigned and he had met in-person only once in prison and that there were only four (4) telephone calls in six years. TT. However, on cross-examination, Mr. Clemons agreed that his parents had permission to communicate with the undersigned about his case in order to update him, and that during representation he received updates on his case approximately four (4) times per month on average. TT. Thus, using the complaining witness' testimony alone, Mr. Clemons estimates that he received weekly updates approximately 288 case status updates during the undersigned' representation.

None of these status updates are mentioned in the RR's findings.

While under vague Bar questioning, Ms. Clemons initially testified that she had difficulty in communicating with the undersigned, on cross-examination she admitted to over 3 dozen in-office status updates with either the undersigned or his staff, for Mr. Clemons at an average of approximately two (2) in-office updates per month. TT. None of this testimony is mentioned in the RR.

In addition, the undersigned' former assistant testified by affidavit that she "personally interacted with Ms. Clemons some eight to ten times [in 2012 alone], including at least three times when she brought Delores Haynes into the office. I also met with Mr. Clemons [complaining witness' father] on at least three occasions, but on those occasions Ms. Hayes was not present." R. 14, Roberts Affidavit, para. 7. These client communications are not mentioned in the RR.

Ms. Clemons further testified that, in addition to in-office visits, she or her husband communicated with the undersigned or his staff via telephone on average approximately two (2) times per month over the course of the 6-year representation, for updates on Mr. Clemons' case. TT. Thus by Ms. Clemons' calculation there were approximately 144 telephone status conferences. Again none of this critical Bar witness testimony on attorney-client communication is mentioned in the RR's findings.

The record further shows that these communications were in addition to direct contact between Mr. Clemons and the undersigned. At trial, the undersigned presented nearly two dozen correspondence, documents and facsimile transmittals from the undersigned that either provide updates, schedule telephonic and in-person meetings with Mr. Clemons in prison[4] transmit documents to Mr. Clemons. R. 15. At trial, Mr. Clemons also concedes to receiving copies of filings and letters

[4] The undersigned provided Bar counsel, Carlo A. Leon, copies of said corroborating documentation of client communication in and around November 30, 2017. R. 19.

from the undersigned updating him on the case status. None of this evidence of additional communications are mentioned in the RR.

Mr. Clemons testified that in September 2012 he received a copy of the victim's affidavit that Respondent filed in his case. Mr. Clemons testified that the longest period of no communication with Respondent was from January 2013 through May 2013. However, Mr. Clemons did testify that he received copies of a motion for new trial and motion to set aside plea and conviction, based upon the affidavit - filed January 23, 2013 and February 20, 2013 respectively according to the case docket. TT. Mr. Clemons further admitted that, because of communications with the undersigned, he was aware that the motions pended for over three years notwithstanding notices to the trial court and requests for expedited review filed both by undersigned and Mr. Clemons *pro se*. TT. The RR also misses these attorney-client communications

D. Scope of Representation

1. Curtis Clemons' Underlying Criminal Conviction

At all times pertinent to this proceeding Mr. Clemons has been incarcerated in Florida State Prison, having been convicted on March 25, 2010 on an amended charge of attempted second degree murder with a deadly weapon, pursuant to a negotiated plea while represented by the Office of Public Defender, (Case No.: 16-2008-CF-012864-AXXX-MA). R.'s Exh. 1-C, 1-D, 1-E.

Mr. Clemons was originally charged by information with attempted murder in the first degree with a deadly weapon (domestic) and kidnapping. Rspd's Exh. 1-A. Admitted to by Mr. Clemons at the change of plea hearing, the initial arrest and booking report alleges that on September 5, 2008 Mr. Clemons stabbed the victim, his girlfriend, several times with a kitchen knife. Bar Exh. 1.

The victim in the case was Dolores Haynes (hereinafter "Ms. Haynes"). Resp.'s Exh. 1-D (sentencing hearing transcript.) Ms. Haynes was severely injured in the attack *Id.*, which left her paralyzed and wheelchair bound according to the testimony of Ms. Clemons, Joy Roberts and the undersigned. TT.

2. Initial Retainer for Post-Conviction Work

Ms. Clemons testified that she hired the undersigned in and around June 2011 to represent her son, Mr. Clemons, "to get less time," on a post-conviction matter for which he was serving time in prison. TT.

Ms. Clemons initially testified, without correction by Bar counsel, that Mr. Clemons had been convicted of aggravated battery upon his girlfriend. On cross-examination, however, Ms. Clemons admitted that, prior to the undersigned' engagement for legal services, her son had been convicted on attempted second degree murder and was sentenced to 30 years to Florida State prison where he remained.

Likewise, Mr. Clemons testified that he received a copy of the undersigned' post-conviction notice of appearance and that he understood the undersigned had been hired by his parents to represent him post-conviction. Mr. Clemons further conceded the undersigned was not hired for any specific issue, but that that after reviewing the case, undersigned was going to determine the appropriate action. TT.

3. Agreement on $5000 Initial Attorney's Fees Retainer

Ms. Clemons testified on direct that the attorney's fee agreement with the undersigned was a retainer of $4,000.00. TT. However, on cross examination, Ms. Clemons conceded that the initial attorney's fee for the post-conviction work was a nonrefundable $5,000.00, as indicated in the written contract for legal services, signed by Ms. Clemons. TT; R. 16. The undersigned also testified to these terms.

This testimony is also missing from the RR, which inaccurately finds a $1000 down payment and "a contract was made the same day for the remaining $4000." RR., pp. 3-4.

Significantly, Ms. Clemons also testified, as did the undersigned, that she understood that payment was to be made in full prior to the commencement of and legal work and that she paid the initial retainer over the course of several months into the following year. TT. Mr. Clemons further testified that his personal case file was voluminous and that it took some time to provide it to Respondent, via his

parents. This testimony is also absent from the RR, though the referee relies upon the length of representation as proof of misconduct.

4. Recantation Affidavit of the Late Delores Hayes and Motions to Set Aside Judgment and Sentence, and for New Trial Based upon Recantation Evidence

On direct examination, without explanatory questioning by Bar counsel, Ms. Clemons pointblank testified that the undersigned failed to file an "appeal" as had been agreed; and that apparently no work had been accomplished by the undersigned although she had been told otherwise. TT.

However, on cross examination Ms. Clemons conceded away most all of her complaining testimony and said that she had been satisfied with the legal services of the undersigned in an unrelated matter. First, contrary to the Bar's allegations in the amended complaint, Ms. Clemons admitted that from June 2011 it took several months for the Clemons to provide the undersigned the voluminous criminal trial file which also included numerous hearing and deposition transcripts.[5] Also

[5] The trial file was extremely large because it was an attempted murder case, the significant injuries to the victim, dozens of depositions had been taken and Mr. Clemons has become a prolific pro se litigant. Prior to his guilty plea Mr. Clemons filed a *pro se* "Motion to Discharge," that is, to dismiss the charges, based on the elapse of the time for speedy trial. Respondent's Exh. 1-B. This would not be the last time Mr. Clemons filed a *pro se* paper on his own behalf. On April 6, 2010, Mr. Clemons filed a *pro se* "Motion to Withdraw Plea" after sentencing. Bar Exh. 2. The court denied the motion on October 21, 2010. Respondent's Exh. 1-G. Thereafter, Mr. Clemons filed a *pro se* "Motion for Post-Conviction Relief Pursuant to Florida Fla. R. Crim. P. 3.850," on May 9, 2010. Bar Exh. 4. That matter was heard by Commissioner, Tod Wright, Esq., acting as Special Master for the First District Court of Appeals, at an evidentiary hearing on May 18, 2011. Mr. Clemons testified, as did his mother, Theresa Clemons. In the special master's Report, Mrs. Clemons is identified as "Terricia Clemons." Respondent's Exh. 1-H. The Report notes that Mrs. Clemons' testimony on behalf of her son was brief, and lacked materiality. *Id.* The Report recommended that Mr. Clemons' Rule 3.850 motion for post-conviction relief be denied. *Id.* Mr. Clemons filed a 4-page handwritten response to the Report. Respondent's Exh. 1-I.

At bar, the referee refers to the pro se filings during the undersigned' representation as an indication that Mr. Clemons was "feeling desperate and abandoned." RR, p. 11. Notably the "desperate and abandoned" language

contrary to the Bar's allegations in the amended complaint, Ms. Clemons admitted that the possibility or even discussion of the victim, the Late Delores Haynes, did not occur until several months following the initial engagement (the undersigned and Mr. Clemons also testified to this fact).

Ultimately, all the witnesses testified that it was determined by the undersigned and agreed upon by Mr. Clemons that the best course of action was to secure an affidavit from Ms. Haynes in support of post-conviction motions for relief and that the decision to proceed in that manner was not made until well into 2012. TT. The undersigned further testified that the possibility or potential for Ms. Hayes' recantation was not known to the undersigned for several months into the representation.

All of these record facts are missing from the RR.

As to Ms. Hayes, Ms. Clemons testified that she had become her caregiver, due to Ms. Haynes' paralysis and other health conditions resulting from Mr. Clemons' knife attack upon her. On cross-examination, Ms. Clemons stated she drove Ms. Hayes to a series of meetings with the undersigned and his staff, at the law office, over a period of months for the undersigned to ultimately prepare an affidavit for Ms. Hayes[3] execution. TT. As indicated *infra*, the affidavit would be

---

comes verbatim from paragraph 34 of the Bar's amended complaint.

used in support of a request for post-conviction relief based upon recantation evidence.

The uncontroverted affidavit of Joy Roberts (hereinafter "Roberts Affidavit") also corroborate the initial scope of representation. R. 14. Ms. Roberts, then legal assistant to the undersigned, avers:

> In 2012 ... I worked on the case, State v. Clemons ... While working on his case, I came to know Mr. Clemons' parents personally, and I came to know Ms. Haynes personally ... I came to know Mrs. Clemons as a friend and driver for Ms. Haynes, who had to use a wheelchair because of her injuries. Ms. Clemons was very interested in her son' case ... As to Ms. Haynes affidavit, on one occasion in 2012 she came to our office and I went outside to speak with her an took notes a legal pad. This was after I had previously met Ms. Haynes ... then contacted Mr. Johnson, who as I recall was working at home that day. We went over the text of her statement. A few days later, Mrs. Clemons brought Ms. Haynes to the office again and I witnessed her signature on [and notarized] the affidavit.

Id., at paragraphs 4-9.

The RR does identify that in preparation of the supporting affidavit the undersigned "interviewed Ms. Haynes carefully, going over her previous testimony, mindful of his duty and of her potential exposure to a charge of perjury. *See* R's Exh. 5 (internal exhibits "E," (Deposition of Delores Haynes) and "F," (victim impact statement)." RR, p. 4 (emphasis added). The RR also acknowledges that the undersigned prepared and filed motions to vacate and set aside judgment

and sentence and for new trial "and attached the affidavit. Bar Exh. 21" RR., at p. 5.

Consistent with the RR's findings (RR, p. 3), "Respondent testified that the scope of his representation was to review Mr. Clemons' entire case to try to find a legal basis for relief from his plea and sentence," the undersigned accomplished same with the filing of the motions and affidavit. The RR does not address this salient fact.

Moreover, the RR makes no comment or findings upon the undersigned' conduct (as to any of the Bar charges) *visa vi* the Haynes affidavit or related post-conviction motions; and the Bar offered no evidence of misconduct in relation to same.

The undersigned testified, and it was unrefuted, that the decision to withdraw the motion for new trial, in February 2013, was based upon legal research that the motion to set aside the judgment and conviction, also filed in February 2013, was the best vehicle for the presentation of recantation testimony. TT.

Importantly, the post-conviction motions to vacate and set aside judgment and sentence, and for new trial, based upon the Haynes recantation affidavit, are the gravamen of the legal work for which the undersigned was initially retained, *i.e.* the initial scope of representation.

Notwithstanding the foregoing, the Bar presented no evidence suggesting that the undersigned' legal determinations in this regard were misconduct and the RR is silent as to *any* misconduct related to the competency of the undersigned' legal work within the initial scope of representation, although the referee finds guilt on competency.

5. Additional $1500 Retainer Paid in September 2016

In the amended complaint, the Bar alleges: "in February 2016 ... Respondent then told Mr. Clemons' parents that if they paid an additional $1,500, he would follow up on the 1st DCA matter [Case No. 1D16-476] ... [a]lthough Mr. Clemons' parents paid as requested, respondent never did follow up in the 1st DCA though he told the parents that he had." R. 1, p. 5. These allegations wholly false.

Though the Bar alleges that the undersigned accepted an additional $1500.00 in February 2016 to represent Mr. Clemons in a *pro se* petition for writ of mandamus filed in the First District Court of Appeal (1D16-476) (*see* R. 1, amended complaint at p. 5), the undisputed evidence at trial was that: no payment of any kind was made in February 2016; in and around September 2016 the undersigned accepted an additional $1500.00 from Ms. Clemons for the potential of filing his *own* future writ or appeal, not to intervene in an existing *pro se* writ; the 1st DCA case (case No. 1D16-476), the *pro se* writ alleged in the amended complaint was actually dismissed in April of 2016, several months prior to the

payment of the additional $1500 retainer in September 2016; and moreover, the undersigned testified that he was never made aware of the *pro se* writ (Case No. 1D16-476) filed by Mr. Clemons during his representation and learned of it only after the Bar complaint had been filed. Indeed, the *pro se* writ case docket (1D16-476) does not reflect any notifications to the undersigned and the undersigned testified, contrary to the allegations, that he was not alerted of same by Mr. Clemons.

Ultimately, discussed below, the undersigned instead filed for a belated appeal, not a petition for writ, and thereafter reimbursed the additional $1500 after being terminated by the client.

E. Once Filed the Trial Court Failed to Rule on Post-Conviction Motion to Vacate Judgment and Sentence For Three Years and Seven Months

As identified in the RR, pursuant to the scope of representation, on January 31, 2013, the undersigned filed a motion for new trial. Following additional and updated legal research on the issue, the undersigned testified that he determined the best vehicle to pursue the relief was by a motion to vacate judgment and sentence based upon the recantation affidavit, and on February 18, 2013 the undersigned filed same and filed a notice withdrawing the motion for new trial. Ex . RR, p. 5.[6]

[6] In support of the misconduct recommendation, the RR makes much of Mr. Clemons' allegation that the

The record is undisputed that the trial court did not enter a ruling on Mr. Clemons' pending motion to vacate judgment and sentence based upon new evidence for 3 years and 7 months. 16-2008-CF-012864, Case Docket. Mr. Clemons also testified that the motions pended for over three years notwithstanding notices to the trial court and requests for expedited review filed both by undersigned and Mr. Clemons *pro se*. TT. None of this testimony is clarified in the RR.

Remarkably, although length of time the motion languished is applied against the undersigned as to all of the charges of misconduct at bar, the referee attributes no responsibility to the trial court as to why it took so long to receive an initial ruling, stating: "[u]nfortunately, there was no action taken by the trial court regarding the Motion to Vacate Sentence for a long time." R. 5, p. 5 (emphasis added).

F. During the 3-1/2 Year Pendency of the Motion to Vacate, the Undersigned Filed a Notice of Pending Motion, a Motion to Expedite Ruling and a Letter to the Presiding Judge – All Requesting a Ruling

At trial the undersigned submitted copies of a notice of pending motion, along with a motion to expedite ruling and a letter from the undersigned to the presiding judge, all filed in trial case, no. 2008-CF-012864 during this period, in an

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undersigned did not inform him of the withdrawal of the motion for new trial (RR, p. 5). However, the undersigned testified to the contrary, that it was his practice to mail Mr. Clemons all copies of filings. Also notable on communication, was Mr. Clemons' disproven allegation that he never received a copy of the petition for belated appeal, discussed below. RR, p. 6.

effort to respectfully remind the trial court of the pending motion and to urge the court to rule, to no avail. RR, at p. 5 (citing Respondent's composite exhibit 3).[7]

G. Referee Found No Misconduct in the Undersigned Not Receiving and Not Responding to Orders on the Motion to Vacate Judgment and Sentence

After pending for over 3 ½ years, the trial court entered an Order on September 23, 2016, granting the motion to withdraw the motion for new trial and dismissing the motion to vacate with 60 days to amend. RR, p. 11. Thereafter the trial entered an order on December 29, 2016, dismissing the motion to vacate judgment and sentence with prejudice. At the August 2, 2018 trial the undersigned testified, as always, that he did not receive either order, although each show a certificate of service to the undersigned' post office box. TT, RR, pp. 11, 15.

The undersigned further testified that as a result of the undersigned' failure to respond to the orders, Mr. Clemons' motion to vacate was dismissed with prejudice. Because the undersigned did not discover the December 29, 2016 order dismissing the motion with prejudice, until beyond the 30-day appeal period, Mr. Clemons' appellate rights had been placed in jeopardy.

The undersigned' testimony that the orders were not received by him and not known to him is consistent with the undersigned' allegations of the petition for

[7] The Referee further notes Mr. Clemons' testimony that he sent his own pro se notices to the court regarding same. RR, p. 5

belated appeal under oath filed in April 2017. The testimony is also consistent with the responses to Mr. Clemons' Bar complaint during the grievance procedure.

In short, the record is clear that at no time did the undersigned engage in deception, untruthfulness or other misconduct in connection with the orders.

Critically important to the entirely of the proceedings at bar, contrary to the Bar's allegations - that the undersigned received the orders, either intentionally or negligently failed to respond and then lied about it – the referee found "the Bar did not prove that Respondent received the Orders from October [September] and December 2016 and then intentionally or negligently failed to do anything in response to amend the motion." RR, pp. 17 (emphasis added).

H. Petition for Belated Appeal Filed to Protect Mr. Clemons' Interests

As testified as trial, upon discovering the orders were not received or timely responded to, the undersigned commenced extensive legal research to determine the best method in which to protect the rights of Mr. Clemons. As a result, the undersigned informed Mr. Clemons of the situation and that a petition for belated appeal was being prepared by the undersigned.

On February 23, 2017, as conceded by the Bar and the referee (though apparently not Mr. Clemons[8]), the undersigned traveled to the prison where Mr. Clemons was located and discussed the case status in detail and the petition with

[8] Mr. Clemons' cloudy testimony and previous statements that he was not informed by the undersigned of the circumstances and was unaware of the belated petition, flies in the face of his own notarized signature upon the petition, dated February 23, 2017.

him. Mr. Clemons read the petition and executed its attached oath before a notary, who notarized the oath. R. 2; RR, p. 6 (criticizing Mr. Clemons' credibility, the referee finds "what Mr. Clemons wrote in his letter to the grievance committee was that '[u]nbeknownst to me Mr. Johnson file a petition for Writ of Habeas Corpus for Belated Appeal on April 10, 2017.'See Bar Exh. 76. Compare that with Mr. Clemons' notarized signature dated February 23, 2017 which appears within the filed petition. See R's Exh. 7 (supplemented); Petition (under oath).").

As always, in the petition the undersigned took full responsibility of the situation:

> Following notices to the trial court of the pending motion and Petitioner's *pro se* notices of "Inquiry," three and one-half (31/2) years later, on September 26, 2016, the trial court entered an order dismissing the motion to vacate with leave to amend. Ex. A, Dkt. #336.
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> ***
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> That order was not received by the undersigned.
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> ***
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> On December 29, 2016, the trial court entered a final order of dismissal, also not received by the undersigned. Ex. A., Dkt. #340.
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> ***
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> <u>The failure of the undersigned to timely file an appeal of the final order, denying the Petitioner's nearly 4-year-old motion for post-conviction relief, was no fault of the Petitioner.</u>

R. Petition for Belated Appeal 1D17-1416, pp. 2-4 (emphasis added).

The work in preparing and filing the belated petition was accomplished, notwithstanding the fact that Mr. Clemons had already filed a Bar complaint against the undersigned in and around February 2017 (apparently after the undersigned informed Mr. Clemons of the situation and before he executed the Oath of Petitioner on February 23, 2017), for the sole purpose of protecting Mr. Clemons' rights.

While the Bar alleges in the amended complaint and RR finds that Mr. Clemons was not provided with a copy of the file petition for belated appeal (R. 1, at p. 12) [9], the Bar's own exhibits show the Bar's concession that Mr. Clemons received a copy of same from the undersigned on June 8, 2017 "received by Clemons." R., Bar Ex., 62 line entry, admitted by the referee.

The referee's finding is also directly at odds with another portion of the RR finding "Mr. Clemons' notarized signature dated February 23, 2017 which appears within the filed Petition. *See* R's Exh. 7 (supplemental); Petition (under oath)." RR, p. 6.

In any event, the petition proved successful, the State of Florida did not object to the reinstatement of the appeal. R. 2, docket. However, in the midst of the foregoing, Mr. Clemons filed a motion to discharge the undersigned and to dismiss

[9] Portions of the RR appear to be cut and pasted from the Bar's amended complaint, *see* "feeling desperate and abandoned" language and compare "Respondent never provided Mr. Clemons with a copy of the motion," (Comp. R. 1, Amended Complaint, paras. 34 and 46) which may explain the referee's apparent confusion on the facts proven at trial.

the action for belated appeal on September 13, 2017. The appellate court directed Mr. Clemons to provide the undersigned copy of the *pro se* motion and for the undersigned to respond. On September 22, 2017 the undersigned responded to the First DCA, in part:

> Notwithstanding that the petitioner has filed a Bar complaint against the undersigned, having conferred with the Florida Bar Ethics Counsel, the undersigned does believe that the complaint creates a conflict of interest interfering with the undersigned competent representation of the Petitioner.

Case No. 1D17-1416.

The Appellate court granted Mr. Clemons' motions and dismissed the appeal on October 3, 2017. After granting Mr. Clemons' motion to discharge the undersigned from the trial court case, his renewed *pro se* post-conviction motion, also based upon the Haynes recantation affidavit, was denied by the trial court on April 13, 2018, in light of her prior testimony. R's Exh. 1-N.

I. <u>The Undersigned' Reliance Upon Florida Ethics Hotline Discounted by Referee</u>

As the undersigned indicated to the First DCA, and to Bar counsel during the investigatory process when Mr. Clemons' new allegations of "threats" were raised in the summer of 2017, the undersigned testified without contravention that he contacted the Florida Bar Ethics Counsel via the hotline on at least two occasions concerning whether continued communication between the undersigned

and Mr. Clemons was appropriate given the Bar complaint and whether the complaint presents a conflict of interest.

Pointing to the rules, the undersigned was informed by the Florida Bar Ethics Counsel that continued communication is not prohibited even where a Bar complaint is pending, but that the Bar complaint could pose a conflict of interest, and it was appropriate that Mr. Clemons immediately decide whether to continue with the complaint or to withdraw the complaint and continue with representation of the undersigned.

The undersigned further testified that he had reached out to Florida Bar Ethics Counsel on numerous occasions over the years for ethics counsel. TT. In the September 18, 2017, email to Bar Counsel the undersigned wrote "I contacted The Bar Ethics Counsel to inquire of whether a per se conflict existed requiring my withdrawal as counsel for Mr. Clemons, in view of the Bar complaint;" and in in the September 22, 2017 email to Bar Counsel, forwarding response to order in case no. 1D17-1416 " ... having conferred with the Florida Bar Ethics Counsel ..."

As the contemporaneous correspondence to Bar counsel makes clear, at trial the undersigned testified that in the summer of 2017, he was contacted by Mr. Clemons' parents who said he would like to meet to discuss remaining on the case.

At that meeting, and again in a letter, the undersigned iterated the Bar Ethics Counsel advice that a conflict was created by the Bar complaint. Contrary to Mr.

Clemons' allegations that the undersigned somehow "bowed up" and became physical during the last prison visit in August 2017, the undersigned testified at trial that the meeting, though cordial, was ended abruptly by Mr. Clemons without explanation.

The foregoing notwithstanding, the referee treats the testimony with jaundice: "Respondent claims that the Bar's Ethics Hotline advised him, on two vague occasions, to give Mr. Clemons and choice: if the Respondent was to continue to represent him, then the Bar complaint should be withdrawn. [Flipping the burden of proof and ignoring the foregoing response to the appellate court and correspondence to Bar counsel] Respondent offered no corroboration of such conversations, no notes memorializing when they occurred, nor any explanation of why two calls were made or why he would turn a blind eye to the Bar's e-mail of August 7, 2017." RR, p.14 (emphasis added). The referee makes these conclusions even though the undersigned' reliance upon the bar Ethics Counsel was not challenged or disputed at trial.

Thus, discounting the undersigned' justifiable reliance upon Bar Ethics Counsel, the referee concluded "[i]t appears by clear and convincing evince that he made an improper demand upon Mr. Clemons at that visit and thus engaged in misconduct." RR, p. 14.

J. Reimbursement of Additional $1500 Retainer

Once the undersigned was discharged by Mr. Clemons, the additional $1500 retainer, paid in September 2016, was reimbursed to Ms. Clemons on October 6, 2017. The undersigned provided Bar counsel notice of same. R. 18.

K. Bifurcation and Mitigation

The undersigned' objection to trying liability and sanctions together and motion to bifurcate was denied by the referee. Thus at trial sanctions evidence was presented, though in an abbreviated fashion because it was at the end of the day.

At trial, the undersigned presented the character letters of Judge Nancy Maloney, client Sean Hal and client Crystal Chisholm. Comp. R. 19. However, the referee excluded the Hall and Chisholm letters, as not signed and untimely.

SUMMARY OF THE ARGUMENT

I. The Report is Not Founded on Clear and Convincing Evidence Because it is Replete with Obvious Errors, Misstatements of Material Fact, Wholesale "Cut and Paste" Adoptions of the Amended Complaint's Verbatim Allegations - Not Proven or Abandoned, and Fails to Recognize Material Record Evidence

The standard at bar is clear and convincing evidence. The U.S. Supreme Court has held that the higher, intermediate, "clear and convincing standard" is reserved for cases "where particularly important individual interests or rights are at

stake," ***Herman & MacLean v. Huddleston***, 9 U.S. 375, 389-90 (1983), such as attorney disciplinary proceedings. ***Florida Bar v. Rayman***, 238 So. 2d 594 (Fla. 1970); ***State ex. Rel. Florida Bar v. Bass***, 106 So. 2d 77 (1958).

The burden of proof is on the Bar and generally a referee's factual findings will be upheld unless clearly erroneous or not supported by competent, substantial evidence in the record, i.e. clear and convincing evidence. ***The Florida Bar v. Scott***, 566 So. 2d 765 (Fla. 1990), *citing* ***The Florida Bar v. Colclough***, 561 So. 2d 1147 (Fla. 1990); ***The Florida Bar v. McKenzie***, 442 So. 2d 934 (Fla. 1983).

The burden in the petition to review is upon the undersigned to demonstrate the RR is "erroneous, unlawful, or unjustified," because clear and convincing evidence is not shown. ***Scott***, 566 So. 2d at 767 (reversing, in part, report and recommendation as factual findings not supported by clear and convincing record evidence); *see also* ***The Florida Bar v. Schonbrun***, 257 So. 2d 6 (Fla. 1971)(rejecting guilt and recommendation of disbarment as RR finding not supported by clear and convincing record evidence); ***The Florida Bar v. Canto***, 668 So.2d 583 (Fla. 1996); ***The Florida Bar v. Porter***, 684 So.2d 810 (Fla. 1996).

In view of the material trial testimony and evidence not considered by the referee, the findings of fact that are clearly erroneous and even contrary to other findings in the same report, conflicting evidence, the finding of no misconduct associated with the preparation and filing of the Haynes Affidavit, the preparation

and filing of the post-conviction motions, the missed orders or the filing of the belated appeal, there is a lack of "clear and convincing" evidence of guilt as to any of the charges of misconduct.

II. The Report's Sanction Recommendation is Not Reasonable Because it is Based Upon Erroneous Factual Findings and Abandoned Allegations, and the Referee Improperly Excluded or Failed to Consider Mitigation Evidence, Exaggerated Aggravation, Misunderstood the Bar's Initial Consent Judgment Offer and Abbreviated the Sanction Hearing

If guilt by clear and convincing record evidence is found, the standard to consider a referee's sanction recommendation is whether it has a "reasonable basis." ***The Florida Bar v. Temmer***, 753 So.2d 555, 558 (Fla. 1999).

While the referee's recommendation is persuasive (if founded upon a reasonable basis), this Court bears the ultimate responsibility for ordering the appropriate sanction. ***Id.***, at 558.

Upon considering a referee's disciplinary recommendation, this Court's scope of review is broader than that of the referee. ***The Florida Bar v. Anderson,*** 538 So.2d 852, 854 (Fla. 1989); *see also* art. V, § 15, Fla. Const.

Further though the rules of discovery are relaxed in the instant proceeding, this Court has recently held that "[i]n all cases, due process requires that the proceedings must both be and appear to be fundamentally fair." ***The Florida Bar v. Garndiner***, 183 So. 3d 240, 244 (Fla. 2014).

The Report's Sanction Recommendation is Not Reasonable Because it is Based Upon Erroneous Factual Findings and Abandoned Allegations, and the Referee Improperly Excluded or Failed to Consider Mitigation Evidence, Exaggerated Aggravation, Misunderstood the Bar's Initial Consent Judgment Offer and Abbreviated the Sanction Hearing.

As a result, to the extent sanctions are appropriate, based upon the full consideration of mitigation, the clear and convincing record facts, causation, injury, along with aggravation warrant a reprimand.

ARGUMENT

III. The Report is Not Founded on Clear and Convincing Evidence Because it is Replete with Obvious Errors, Misstatements of Material Fact, Wholesale "Cut and Paste" Adoptions of the Amended Complaint's Verbatim Allegations - Not Proven or Abandoned, and Fails to Recognize Material Record Evidence

III. Introduction

In its RR, the referee makes certain material findings that are foundational as to all guilt recommendations.

First, the RR finds the attorney-client communication "deplorable." RR, p. 5.

Second, the RR finds that the undersigned exhibited "a lack of diligence in following through with his client and the court." *Id.*

Third, the RR finds that the undersigned gave "misleading information about his plans to Mr. Clemons." *Id.*

Fourth, the RR finds that the undersigned had "competence issues." *Id.*

Fifth, the RR finds that "[o]n December 16, 2016, Respondent contacted Mr. Clemons and told him that he filed paperwork in the 1st DCA, was waiting for the court to rule, and had as a result earned the $1500." *Id.*, at p. 12.[10]

Sixth, once again cutting and pasting from the Bar's amended complaint, the RR finds that the undersigned "never provided Mr. Clemons with a copy of the motion [petition for belated appeal]." *Id.*, at p. 12

Seventh, the RR finds that the undersigned "made an improper demand [that Mr. Clemons drop the complaint] upon Mr. Clemons at that [prison] visit and thus engaged in misconduct." *Id.*, at p. 14.

None of these findings are supported by clear and convincing evidence, some are contrary to the evidence, other findings were not even raised at trial and many appear to have been simply cut and pasted from the Bar's amended complaint without regard to what was *actually* presented at trial.

IV. The Findings on Attorney-Client Communications are Erroneous, Not Based Upon Competent, Substantial Record Evidence

[10] Again, as mentioned infra and demonstrated below, many material portions of the RR "findings" are simply cut and pasted from the Bar's amended complaint and, moreover, were not proven or even raised at trial. The instant passage declares "[o]n December 16, 2016, Respondent contacted Mr. Clemons and told him that he filed paperwork in the 1st DCA, was waiting for the court to rule, and had as a result earned the $1500." This finding comes verbatim from paragraphs 42 & 43 of the Bar's amended complaint, but no competent, substantive evidence was presented thereon at trial.

The referee writes "there was a deplorable lack of communication by the Respondent to Mr. Clemons ... " R. 5, p. 5 (emphasis added), which becomes the first crux of the findings of guilt.

In this determination, the RR utterly rejects the testimony of Bar witness, Ms. Clemons, who testified without contravention that during the 6-year representation, she met approximately 30 times with the undersigned and another 5 times with the undersigned' staff, in order to relay those updates to her son, former client Mr. Clemons.[11] TT.

Ms. Clemons also testified that she or her husband averaged twice a month in status telephone calls with the undersigned, during the representation, meaning an approximate total of 144 times. TT. By Ms. Clemons unrefuted testimony alone, she thus approximates 179 attorney communications during the representation for status updates for Mr. Clemons.

While Mr. Clemons initially claimed that there were long periods of no communication (longest being about 4-5 months – not years as suggested by the RR), on cross-examination, he agreed that his parents had permission to communicate with the undersigned about his case in order to update him, and that

[11] All witnesses, Ms. Clemons, Mr. Clemons, the affiant and the undersigned testified that, from the beginning of the representation, that in addition to direct communication, in view of his out-of-town prison incarceration, Mr. Clemons gave his parents express permission to directly communicate with the undersigned and staff about his case and that his parents would relay that information to Mr. Clemons via telephone conversations or visits in prison. TT.

during representation he received updates on his case approximately four (4) times per month on average. TT.

Thus, using the complaining witness' testimony alone, Mr. Clemons estimates that he received weekly updates approximately 288 case status communications during the undersigned' representation.[12]

The record further shows that these communications were in addition to direct contact between Mr. Clemons and the undersigned.

At trial, the undersigned presented nearly two dozen correspondence, documents and facsimile transmittals from the undersigned that either provide updates, schedule telephonic and in-person meetings with Mr. Clemons in prison[13] transmit documents to Mr. Clemons. *See* Respondent's Exh. 2 (Composite). At trial, Mr. Clemons conceded to receiving copies of filings and letters from the undersigned updating him on the case status. TT.

None of the aforementioned attorney-client communications are mentioned in the RR, excluding hundreds of contacts from the analysis, instead alleging long gaps in communication via an attached, flawed "timeline."

Further, contrary to the evidence, the referee did not find that Mr. Clemons immediately authorized his parents, Curtis and Theresa Clemons, to communicate with the undersigned

[12] By contrast, if only 72 status contacts were shown over the period of the representation, that would still average one attorney-client communication per month.
[13] The undersigned provided Bar counsel, Carlo A. Leon, copies of said corroborating documentation of client communication in and around November 30, 2017. R.

regarding Mr. Clemons' case for the purposes of relaying status updates to Mr. Clemons, via his parents through their communications with the undersigned. TT.

In view of the foregoing, misconduct based upon lack of communication is not established by clear and convincing evidence, given the hundreds of communications testified about or documented at trial, which are overlooked by the referee. ***Scott,*** 566 So. 2d at 767 (reversing, in part, report and recommendation as factual findings not supported by clear and convincing record evidence); *see also* ***The Florida Bar v. Schonbrun,*** 257 So. 2d 6 (Fla. 1971)(rejecting guilt and recommendation of disbarment as RR finding not supported by clear and convincing record evidence).

V. None of the Report's Findings on Lack of Diligence, Misleading Information, Competence or the Belated Appeal are Based Upon Clear and Convincing Evidence and the Referee's Determination That There was No Misconduct with the Missed Trial Court Orders of September and December 2016 or the Post-Conviction Motions is Inconsistent with The Findings

The RR finds that the undersigned exhibited "a lack of diligence in following through with his client and the court" and "giving misleading information." ***Id.,*** p. 5.

Addressing diligence with "following up" with the trial court first, the referee fails ever acknowledge the undisputed record fact that the trial court took 2

February 2013 and not initially ruled upon until September 26, 2016. (Case No. 2008-CF-012864, docket entries 326 & 336).

In terms of "following up" with the trial court during this period of court inaction, at trial the undersigned presented evidence and testimony of efforts to respectfully urge the trial court to rule, including: copies of a notice of pending motion, along with a motion to expedite ruling and a letter from the undersigned to the presiding judge, all filed in trial case. RR, at p. 5 (citing Respondent's composite exhibit 3).[14] The RR does not recognize this effort, nor does the referee cite to a specific moment the undersigned did not follow up with the trial court.

Never has there been any allegation or evidence presented that the undersigned provided any misleading information to any court.

Inconsistent with the lack of diligence and misleading information finding, the referee concluded "the Bar did not prove that Respondent received the Orders from October [September] and December 2016 and then intentionally or negligently failed to do anything in response to amend the motion." RR, pp. 17 (emphasis added).

At the August 2, 2018 trial the undersigned testified that he did not receive either order, although each show a certificate of service to the undersigned' post

The undersigned' testimony that the orders were not received by him and not known to him is consistent with the undersigned' allegations of the petition for belated appeal under oath filed in April 2017. The testimony is also consistent with the responses to Mr. Clemons' Bar complaint during the grievance procedure.

Likewise, the RR makes no specific findings as the undersigned legal determinations regarding recantation affidavit, post-conviction motions or the petition for belated appeal; and the Bar offered no evidence at trial of incompetence in the undersigned' legal determinations in that regard. In fact, for the referee's edification, the undersigned testified how the felony post-conviction process worked, including the successful Chisholm post-conviction matter, saving the client 25 years prison after several years of litigation.[15]

The only other mention within the RR of the undersigned' "follow up" with a court is the RR's *commendation* of the undersigned for filing "a Response to Mr. Clemons' *pro se* Motion to Voluntarily Dismiss the Appeal and Motion to Discharge Counsel." RR, p. 14. Notwithstanding the foregoing, the referee fails to mention or understand that the "response" was filed in the Petition for Belated Appeal case filed by the undersigned. (1D17-1416).

Given the finding of no intentional or negligent misconduct associated with the post-conviction motions, no findings of misconduct for failing to respond to the

[15] The assigned referee is a county judge with no judicial experience with felony post-conviction Rule 3.850 proceedings.

2016 orders, no findings a to the recantation affidavit or the efficacy of the petition for belated appeal, the finding of lack of diligence *visa vi* failing to "follow up" with a court was not established by clear and convicting evidence. ***Scott,*** 566 So. 2d at 767.

Likewise, the finding of lack of diligence as to follow up with Mr. Clemons does not pass muster. In addition to the hundreds of status updates, telephone calls, letters and transmittals testified to at trial, the competent testimony at trial was that the undersigned commenced extensive legal research to determine the best method in which to protect the rights of Mr. Clemons.

The referee agrees the undersigned took careful attention to his duties in the preparation of the Haynes Affidavit. The referee agrees that the undersigned filed post-conviction motions based upon the affidavit and the undersigned' scope of representation. The referee agrees that the Court took 3 ½ years to rule. The referee agrees that the undersigned' failure to respond to the 2016 orders was not shown to be misconduct.

However, the referee's finding that the undersigned misrepresented to Mr. Clemons that he had already filed an appeal in December 2016, is not based upon competent evidence and indeed contrary to the referee's finding that the undersigned' failure to respond to the 2016 orders was not shown to be misconduct because referee found the failure to be the result of not knowing about the orders.

Upon learning of the missed orders, the undersigned informed Mr. Clemons of what happened and the plan to correct the situation through a petition for belated appeal was being prepared by the undersigned.

On February 23, 2017, as conceded by the Bar and the referee (though apparently not Mr. Clemons[16]), the undersigned traveled to the prison where Mr. Clemons was located. There, together, the undersigned and Mr. Clemons again discussed the case status in detail and the petition. Mr. Clemons read the petition and executed its attached oath before a notary, who notarized the oath. R. 2; RR, p. 6 (criticizing Mr. Clemons' credibility, the referee finds "what Mr. Clemons wrote in his letter to the grievance committee was that '[u]nbeknownst to me Mr. Johnson file a petition for Writ of Habeas Corpus for Belated Appeal on April 10, 2017.'See Bar Exh. 76. Compare that with Mr. Clemons' notarized signature dated February 23, 2017 which appears within the filed petition. See R's Exh. 7 (supplemented); Petition (under oath).").

As always, in the petition the undersigned took full responsibility of the situation:

> Through the undersigned, on February 20, 2013, Petitioner filed a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850, with the trial court, <u>for the first time alleging new</u>

[16] Mr. Clemons' cloudy testimony and previous statements that he was not informed by the undersigned of the circumstances and was unaware of the belated petition, flies in the face of his own notarized signature upon the petition, dated February 23, 2017.

> evidence recantation by the victim via sworn affidavit. Ex. A, Dkt. #326.
>
> ***
>
> Following notices to the trial court of the pending motion and Petitioner's *pro se* notices of "Inquiry," three and one-half (31/2) years later, on September 26, 2016, the trial court entered an order dismissing the motion to vacate with leave to amend. Ex. A, Dkt. #336.
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> That order was not received by the undersigned.
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> On December 29, 2016, the trial court entered a final order of dismissal, also not received by the undersigned. Ex. A., Dkt. #340.
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> The failure of the undersigned to timely file an appeal of the final order, denying the Petitioner's nearly 4-year-old motion for post-conviction relief, was no fault of the Petitioner.

R. Petition for Belated Appeal 1D17-1416, pp. 2-4 (emphasis added).

The work in preparing and filing the belated petition was accomplished, notwithstanding the fact that Mr. Clemons had already filed a Bar complaint against the undersigned in and around February 2017 (apparently after the undersigned informed Mr. Clemons of the situation and before he executed the Oath of Petitioner on February 23, 2017), for the sole purpose of protecting Mr. Clemons' rights. ***The Florida Bar v. Leggett***, 414 So. 2d 192, 193 (Fla. 1982) ("The practitioner is expected to see to his clients' affairs even when disruptive external forces interfere.").

After the undersigned researched and drafted a petition for belated appeal of order denying post-conviction motion under oath, travelled to Mr. Clemons in prison in February 2017 for his execution of the petition under oath before a notary, and filed same on Mr. Clemons' behalf, in the 1st DCA on April 10, 2017 (Case No. 1D17-1416).[17]

Instead of acknowledging the undersigned' efforts in that regard, the RR erroneously misstates the evidence claiming the undersigned failed to provide Mr. Clemons a copy of the petition and that "[t]here is no record of Respondent having filed anything in the 1st DCA." RR, p. 12.

The foregoing facts thus do not support clear and convincing evidence of guilt. ***Scott,*** 566 So. 2d at 767.

VI. <u>The Referee Findings as to the Additional $1500 Retainer Are in Clear Error</u>

Still again cutting and pasting directly from the Bar's amended complaint allegations, without regard to trial evidence, the referee concludes that "[o]n December 16, 2016, Respondent contacted Mr. Clemons and told him that he filed paperwork in the 1st DCA, was waiting for the court to rule, and had as a result earned the $1500." *Id.*, at p. 12.[18] Indeed, the referee does not even identify what

[17] Discussed *supra*, notwithstanding the petition to file belated appeal being successful (the State of Florida had no objection), the 1st DCA granted Mr. Clemons' motions to discharge the undersigned and to voluntarily dismiss the case (wherein he falsely claimed that the undersigned did not make him aware of the petition). None of these facts are mentioned in the RR.

[18] Again, as mentioned infra and demonstrated below, many material portions of the RR "findings" are simply cut and pasted from the Bar's amended complaint and, moreover, were not proven or even raised at trial. The instant passage declares "[o]n December 16, 2016, Respondent contacted Mr. Clemons and told him that he filed paperwork

witness is alleged to have so testified. This so because there was no such testimony.

Rather, the RR confuses the Bar's amended complaint that alleges an additional $1500.00 in February 2016 to represent Mr. Clemons in a *pro se* petition for writ of mandamus filed in the First District Court of Appeal (1D16-476). R. 1, amended complaint at p. 5. In its place, the referee changes the payment date of the additional fees from February to September 2016 (apparently based upon the Bar witnesses' concession to same at trial) but maintains the Bar's allegations "[t]here is no record of respondent having filed anything in the 1st DCA." Compare RR, p. 12 with Bar's amended complaint, at paragraph 42, "[t]here is no record of respondent having filed anything in the 1st DCA."

This mishmash of the complaint's allegations within the RR is not supported by the undisputed evidence at trial that:

1) no payment of any kind to the undersigned was made in February 2016;

2) in and around September 2016 the undersigned accepted an additional $1500.00 from Ms. Clemons for the potential of filing his *own* future writ or appeal, not to intervene in an existing *pro se* writ;

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in the 1st DCA, was waiting for the court to rule, and had as a result earned the $1500." This finding comes verbatim from paragraphs 42 & 43 of the Bar's amended complaint, but no competent, substantive evidence was presented thereon at trial.

3) the 1st DCA case (case No. 1D16-476), the *pro se* writ alleged in the amended complaint was actually dismissed in April of 2016, several months prior to the payment of the additional $1500 retainer; and

4) moreover, the undersigned testified that he was never made aware of the *pro se* writ (Case No. 1D16-476) filed by Mr. Clemons during his representation and learned of it only after the Bar complaint had been filed. Indeed, the *pro se* writ case docket (1D16-476) does not reflect any notifications to the undersigned and the undersigned testified, contrary to the allegations, that he was not alerted of same by Mr. Clemons.

Rather, as testified at trial, in September 2016 the additional $1500 was paid for the contemplated filing for a writ in the First District to require the trial court to rule on the pending motion.

However the undersigned instead filed for a belated appeal, and not a petition for writ, and thereafter reimbursed the additional $1500.

In view of the foregoing, the RR's findings of misconduct as to the additional $1500 retainer is not supported by clear and convincing, competent and substantial evidence. ***Scott,*** 566 So. 2d at 767 ***The Florida Bar v. Quick,*** 279 So. 2d 4 (Fla. 1973) (clear and convincing evidence necessary); ***The Florida Bar v. Schonbrun,*** 257 So. 2d 6 (Fla. 1971) (referee's finding was not supported by clear and convincing proof); ***The Florida Bar v. Rayman,*** 238 So. 2d 594 (Fla. 1970)

(quantum of proof necessary to disbar need not be beyond and to the exclusion of a reasonable doubt, but clear and convincing).

VII. The Referee Erred In Finding an Improper Demand and Failed to Consider the Bar Ethics Reliance

Finally, as to guilt, the referee finds that in August 2017, the undersigned "made an improper demand [that Mr. Clemons drop the complaint] upon Mr. Clemons at that [prison] visit and thus engaged in misconduct." *Id.*, at p. 14.

Placing full faith in the unsubstantiated assertion of Mr. Clemons, who also wildly claimed that the undersigned became physically aggressive with him during the prison meeting, the referee completely discounts that the undersigned contacted the Florida Bar Ethics Counsel *via* the hotline on at least two occasions concerning whether continued communication between the undersigned and Mr. Clemons was appropriate given the Bar complaint and whether the complaint presents a conflict of interest.

As over the years, the undersigned relied upon advice of Florida Bar Ethics Counsel that continued communication was not prohibited, but that the Bar complaint could pose a conflict of interest, and that Mr. Clemons should decide whether to continue with the complaint, or to withdraw the complaint and continue

with representation of the undersigned. The undersigned testified that he recalled a disclaimer at the beginning of the call that it may be recorded.

Further on at least two (2) occasions, long before the instant complaint was filed, the undersigned emailed Bar Counsel, Carlos Leon, informing Bar counsel of the undersigned' reliance upon the hotline, long before Mr. Leon decided to bring the 'improper demand" charges ("I contacted The Bar Ethics Counsel to inquire of whether a per se conflict existed requiring my withdrawal as counsel for Mr. Clemons, in view of the Bar complaint."); September 22, 2017 email to Bar Counsel forwarding response to order in case no. 1D17-1416 (" ... having conferred with the Florida Bar Ethics Counsel ...").

As the contemporaneous correspondence to Bar counsel makes clear, at trial the undersigned testified that in the summer of 2017, he was contacted by Mr. Clemons' parents who said he would like to meet to discuss remaining on the case.

The RR is void of these record facts.

At that meeting, and again in a letter, the undersigned iterated the Bar Ethic Counsel advice that a conflict was created by the Bar complaint. The undersigned testified at trial that the meeting, though cordial, was ended abruptly by Mr. Clemons without explanation shortly after it began. The undersigned further testified that a meeting had been scheduled earlier, but that Mr. Clemons had refused to meet with him, TT.

The foregoing notwithstanding, the referee treats the testimony with jaundice: "Respondent claims that the Bar's Ethics Hotline advised him, on two vague occasions, to give Mr. Clemons and choice: if the Respondent was to continue to represent him, then the Bar complaint should be withdrawn. [Flipping the burden of proof and ignoring the foregoing response to the appellate court and correspondence to Bar counsel] Respondent offered no corroboration of such conversations, no notes memorializing when they occurred, nor any explanation of why two calls were made or why he would turn a blind eye to the Bar's e-mail of August 7, 2017." RR, p.14 (emphasis added). The referee makes the conclusions, even though the undersigned' reliance upon the bar Ethics Counsel was not challenged or disputed at trial.

In view of Mr. Clemons' "serious" credibility concerns identified by the referee, including lying to the police about him crime and to the Bar grievance committee[19] about the petition for belated appeal, along with his felony conviction for attempted second degree murder and his clear motive to gain some potential leverage in his post-conviction matters by the outcome at bar, and the undersigned' undisputed reliance upon the Florida Bar Ethics Counsel hotline, the RR's credibility determination in this regard is in error. ***Scott,*** 566 So. 2d 765 (Fla. 1990)(referee's factual findings will not be upheld where clearly erroneous or not

[19] RR, at p. 6.

supported by competent, substantial evidence in the record), *citing* ***The Florida Bar v. Colclough***, 561 So. 2d 1147 (Fla. 1990); ***The Florida Bar v. McKenzie***, 442 So. 2d 934 (Fla. 1983).

VIII. The Report's Sanction Recommendation is Not Reasonable Because it is Based Upon Erroneous Factual Findings and Abandoned Allegations, and the Referee Improperly Excluded or Failed to Consider Mitigation Evidence, Exaggerated Aggravation, Misunderstood the Bar's Initial Consent Judgment Offer and Abbreviated the Sanction Hearing

To the extent the undersigned is found guilty of misconduct, this Court's scope of review is broader than that of the referee. ***The Florida Bar v. Anderson,*** 538 So.2d 852, 854 (Fla. 1989); *see also* art. V, § 15, Fla. Const. While the referee's recommendation is persuasive (if founded upon a reasonable basis), this Court bears the ultimate responsibility for ordering the appropriate sanction. ***The Florida Bar v. Temmer***, 753 So.2d 555, 558 (Fla. 1999).

Here, the referee recommends a 6-month suspension, commenting that the Bar argued for a one-year suspension at trial. However, through trial, the Bar's offer to resolve the complaint was a 60-day offer with an automatic reinstatement. The referee fails to provide the undersigned complete mitigation based upon the record and actually abbreviated the sanction hearing that began only after the full day's trial.

The undersigned testified about the pro bono work of the Slover and Chisholm matters which, should have provided mitigation, which resulted in successful outcomes for the clients.

The undersigned further testified his *pro bono* work, included a 4-year representation of Robert Slover, member of the Armed Forces, including trial, successfully resulting in the dismissal of the initial charge of DUI (16-2010-CT-005825) and saving the young man's military career. Comp. R. 19.

The undersigned also testified about the 6-year representation of Crystal Chisholm, who was sentenced to 35 years prison for her juvenile crime. Following several years of post-conviction litigation, appeals in state and federal courts, awaiting ruling, and years after the case became *pro bono*, the undersigned won Ms. Chisholm's freedom with a vacation of the sentence, saving her from an additional 25 years of prison. (16-2009-CF-009435, 9436, 9654). Comp. R. 19.

The RR is silent as to the undersigned' successful pro bono work and does not consider the lack of profit motive, causation, injury and corrective action taken by the undersigned. Moreover, the sanctions recommendation is based upon a report that is replete with errors of fact, testimony and allegations, is missing evidence and based upon a misunderstanding that the Bar initially sought a 60-day suspension notwithstanding its punitive demand for 1-year suspension at trial - thus the RR cannot be the basis of a reasonable sanctions request.

Furthermore, the referee exaggerates aggravation as to SC06-789, because the matter was actually a technical violation and probation was successfully completed.

In view of the foregoing, sanctions, if any, should be a reprimand.

CONCLUSION

Based upon the foregoing, the Court should reject the Referee's recommendations of guilt and sanctions.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant Brief complies with the requirements of Fla. R.App.P. 9.210(a).

/s/ Earl M. Johnson Jr.
Earl M. Johnson, Jr., Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to CARLOS ALBERTO LEON, Bar Counsel, via cleon@flabar.org., on December 31, 2018.

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