

**IN THE SUPREME COURT OF FLORIDA
(Before the Supreme Court of Florida)**

THE FLORIDA BAR
Complainant,

v.

**CASE NO. SC96767
TFB NOS. 1996-51,085(15B)
1997-50,110(15B)**

F. LEE BAILEY,
Respondent.
_____ /

**THE UNITED STATES ATTORNEY’S OBJECTION TO
RESPONDENT’S MOTION FOR RELIEF FROM JUDGMENT
BASED ON NEWLY DISCOVERED EVIDENCE**

COMES NOW the United States Attorney, as friend of the Court and files this response opposing the various motions filed by respondent in this case and presently pending before the court.

The United States Attorney states as follows:

F. Lee Bailey has made two factual assertions which he claims support the conclusion that his case should be remanded. These claims consist of the following:

The “missing” memorandum claim

On May 17, 1994, AUSA Thomas Kirwin took some notes consisting of a total of approximately one-half of one page of handwritten cursive writing (hereafter referred to as “Notes”). The “Notes” pertain to a pre-plea meeting which took place in the chambers of the Honorable Maurice M. Paul on that same date, May 17, 1994. The pre-plea meeting occurred immediately prior to the entry of a guilty plea by Claude DuBoc to the then pending indictment (case number GCR 94-01009). The respondent, F. Lee Bailey, represented DuBoc. Mr. Bailey claims that the “Notes” are newly

discovered. This assertion is simply untrue.

Mr. Bailey and his lawyers have had possession of a complete and accurate copy of Mr. Kirwin's "Notes" for more than four years. In fact, the Government initially provided a copy of the "Notes" to Mr. Bailey during the deposition taken of AUSA Kirwin on May 16, 1996. This deposition was taken by Respondent in preparation for a hearing which was scheduled for August 13, 1996, before the Honorable Maurice M. Paul and which pertained to the disposition of certain assets belonging to Claude DuBoc, including the BioChem stock. The "Notes" were the subject of specific inquiry during this deposition. (See attached excerpt, "Exhibit A" with attached "Notes")

Subsequently, during the August 13, 1996 hearing, counsel for Mr. Bailey again made specific inquiry of the "Notes" and put the full text of the "Notes" into the record. Mr. Bailey's lawyer reviewed, on the record, the "Notes" line by line with AUSA Kirwin during Kirwin's testimony.¹ (See attached excerpt, "Exhibit B")

On April 13, 2000, AUSA Kirwin was again deposed, this time by Respondent Bailey personally. During that deposition the respondent, Mr. Bailey, stated that the Florida Bar had turned over the "Notes" to Mr. Bailey during discovery (Kirwin Deposition, p. 81, line 8-15 attached as "Exhibit C"). During the course of that same deposition, AUSA Kirwin reminded the respondent that a copy of the "Notes" had been attached to Kirwin's May 16, 1996 deposition and pointed out that respondent's then attorney had taken him "line by line through that ..." (Kirwin deposition, p85, lines 3-7, attached as "Exhibit C").

¹Bailey was personally present during this hearing

Additionally, during the Bar Proceedings before the Referee that gave rise to this appeal, the Bar offered to put the full text of the “Notes” into evidence by introducing a copy of the transcript previously described. The respondent opted to have AUSA Kirwin testify concerning the “Notes” using his “best recollection.” (See attached excerpt, “Exhibit D”)

Finally, it was the respondent’s attorney in the Court of Claims case that produced a copy of the “Notes.” It was Respondent’s attorney to whom a copy of the “Notes” had been delivered back in May, 1996.

The respondent alleges that the “Notes” are newly discovered evidence. This allegation is disingenuous at best. In truth, as outlined above, the respondent has known about and had the “Notes” in his possession since May, 1996. Respondent’s claim is particularly troubling since these “Notes” were testified to and discussed in the Referee’s hearing below.

False Testimony Claim

Respondent alleges that AUSA Kirwin’s testimony was “false and misleading.” This assertion is made based on testimony purportedly given by AUSA Kirwin at the Proceedings before the Referee which allegedly contradict AUSA Kirwin’s testimony in a subsequent deposition. Respondent sets out AUSA Kirwin’s purported testimony at length in his Motion to Relinquish Jurisdiction.

Incredibly, respondent alleges that AUSA Kirwin has given “false and misleading” testimony before the referee without apparently reading AUSA Kirwin’s testimony. Even a cursory reading of the record would have revealed that respondent has attributed the testimony of Mr. Miller to AUSA

Kirwin.² Nothing in AUSA Kirwin's testimony is inconsistent with the "Notes." In fact, respondent has not and cannot show that AUSA Kirwin's testimony has been inconsistent throughout the five different statements he has made under oath concerning these events. It is simply incredible that respondent would, without even a rudimentary examination of the record, make an allegation in the Supreme Court of this state that an officer of the court and a member of the Florida Bar essentially committed perjury.

Respondent also claims that AUSA Miller³ was shown to have given false testimony as a result of the newly discovered "Notes." In fact, the "Notes" are simply handwritten notes which are not and have never purported to be, a verbatim transcript of what occurred during the pre-plea meeting on May 17, 1994. Respondent's reliance on a fragmentary note as support for a charge that Mr. Miller's testimony "was false and misleading" is equally incredible. AUSA Miller has been steadfast over the years and throughout the various hearing in his recollection and recounting of that meeting. He was the main speaker for the government at the May 17, 1994 meeting⁴ and would certainly have the best recollection of what was said. The "Notes" were not meant to be and should not be relied upon as a transcript of exactly what was said during that meeting.

Conclusion

² Actually, even a cursory reading of his own pleading would have revealed respondents' error. He attributes the exact same quote (complete with record citation) to both AUSA Kirwin and AUSA Miller. (pp 10-11 and 13-14, Respondent's Motion to Relinquish.)

³Gregory Miller was in private practice at the time he testified before the Referee. He has since rejoined the U. S. Attorney's Office.

⁴ See excerpt from Kirwin's deposition at p. 83, (attached as "Exhibit C")

Respondent has essentially accused the United States Department of Justice of engaging in a pattern of obstruction in this case. Without any factual or legal support he merely states that the “Department of Justice would not cooperate in allowing some of its employees to be subpoenaed to testify at that Bar proceeding.” (Respondent’s Motion to Relinquish, p10) The Department of Justice simply required the respondent to comply with its regulations, the same requirements of law that anyone else wanting to depose DOJ employees has to meet. No special burdens or obstacles were placed on the respondent. He asserts that the “Notes” that were delivered to him in May, 1996 are newly discovered evidence in the year 2000. He accuses an Assistant United States Attorney of committing perjury by attributing to him another person’s testimony. These assertions, all shown by the record to be false, are the sole bases for his Motion to Relinquish Jurisdiction. A review of the “evidence,” which Mr. Bailey and his counsel have presented to this Court, raises a question as to whether Respondent is recklessly careless or intentionally trying to mislead this Court. The Motions should be denied as meritless.

Respectfully submitted.

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CERTIFICATE OF SERVECE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by U. S. Mail to the following counsel of record this _____ day of December, 2000:

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