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DIVISION OF
ADMINISTRATIVE
HEARINGS

**IN DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT**

CASE NO. 1D01-1104

DBPR Case No. 99-01496
DBPR Final Order No. 2001-00874
DOAH Case No. 00-1235

Closed

BERNARD C. POITIER,

Appellant,

v.

**DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION, BOARD OF
FUNERAL DIRECTORS AND EMBALMERS,**

Appellee.

**ON APPEAL FROM THE DIVISION OF
ADMINISTRATIVE HEARINGS, STATE OF FLORIDA**

APPELLANT'S INITIAL BRIEF

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ISSUES PRESENTED

- I. WHETHER THE BOARD'S FINAL ORDER, INCLUDING ITS DETERMINATION OF AGGRAVATING CIRCUMSTANCES TO REVOKE POITIER'S LICENSE, WAS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE?**
- II. WHETHER THE SEVERELY INCREASED PENALTY IMPOSED BY THE BOARD WAS "ARBITRARY AND CAPRICIOUS"?**
- III. WHETHER DUE PROCESS COMPELS POITIER'S REINSTATEMENT, OR AT A MINIMUM A NEW HEARING, SO THAT HE MAY PRESENT NEWLY-FOUND EVIDENCE OF INVESTIGATOR FORD'S MISCONDUCT AND PERJURY, AND FREELY CROSS-EXAMINE HIM THEREUPON?**
- IV. WHETHER POITIER IS ENTITLED TO A NEW HEARING BECAUSE HE WAS NOT ADVISED OF HIS RIGHT TO COUNSEL?**

STATEMENT OF THE CASE

This case involves the revocation by Appellee, the Board of Funeral Directors and Embalmers (hereinafter the "Board"), of a license to Appellant, BERNARD C. POITIER, as a funeral director and embalmer, pursuant to Subsections 470.036(1)(g) and (p), Florida Statutes (2000).¹

On October 6, 1999, the Department of Business and Professional Regulation (the "Department") filed an Administrative Complaint (the "Complaint") alleging that Poitier, a licensed funeral director and embalmer for over 25 years, and owner and director of Poitier Funeral Home, Inc., committed "negligence, incompetence or misconduct" by refusing to promptly transfer custody of the remains of the decedent, Basilia Balerio Suazo, to another funeral

¹ Subsections 470.036(1)(g) and (p) provide:

(1) The following acts constitute grounds for which the disciplinary actions in subsection (2) may be taken:

(g) Fraud, deceit, negligence, incompetency, or misconduct, in the practice of funeral directing or embalming, funeral establishment operation, cinerator facility operation, removal service operation, or refrigeration service operation.

(p) Refusing to surrender promptly the custody of a dead human body upon the express order of the legally authorized person; however, this provision shall be subject to any state laws or rules governing custody or transportation of deceased human bodies.

home engaged by the decedent's family when payment arrangements could not be made to Poitier's satisfaction. (R1-1-9.)²

On or about November 6, 1999, Poitier filed an "election of rights" pursuant to the Florida Administrative Procedure Act and Florida Administrative Code disputing the Complaint and compelling assignment of the case to the Division of Administrative Hearings. (R1-20.) In his "election of rights", Poitier denied all of the material allegations of impropriety against him.

On June 21, 2000, a hearing was held before the Honorable Susan B. Kirkland, Administrative Law Judge, at which Poitier represented himself *pro se*, having not been advised by the Department (a State prosecuting agency) or the Court of his right to counsel. (R2-1-143.) Following the hearing, the Department submitted proposed findings of fact and conclusions of law, and suggested that Poitier's license should be revoked with leave to reinstate after one (1) year. (R1-77-91). Poitier did not submit anything for the court's consideration.

On October 19, 2000, Judge Kirkland entered a Recommended Order. (R1-106-116.) The court found the facts of the case far less egregious than alleged in the Department's Complaint or elicited at the hearing. Nevertheless, Judge Kirkland agreed with the Department that the testimony and evidence demonstrated

² The two-volume Record-on-Appeal will be referred as "R1" and "R2" followed by the appropriate page number. Other materials on which Appellant relies shall be filed as a single Appendix of Exhibits, which Appellant moves herewith to supplement the record.

that Poitier was in violation of both Subsections 470.036(1)(g) and (p). Rather than revoke his license, however, the court recommended that Poitier be placed on *probation* for one year. (R1-106-116.)

On November 17, 2000, the Board met to consider Judge Kirkland's recommendations in anticipation of issuing its final order. (R1-118.) Poitier had recently undergone abdominal surgery and was unrepresented.³ (R1-119-121.) *And see* Appendix, Exhibit A. His absence mitigated strongly against him, for the Board decided to far exceed Judge Kirkland's recommended penalty and revoke Poitier's license *without* leave to reinstate.⁴ (R1-120-121.)

At Poitier's request, the Board convened on February 8, 2001, to reconsider. (R1-123.) Again, Poitier was unrepresented. Consequently, the Board adopted in full the facts determined by Judge Kirkland, as well as her conclusions of law. (R1-125.) As indicated, however, the Board did not adopt Judge Kirkland's penalty. Finding three (3) aggravating factors (R1-125-126), and choosing to disregard new evidence brought to its attention discrediting the Department's star witness,⁵ the Board persisted in substantially deviating from

³ Poitier retained counsel, Michael B. Feiler, following the June 2000 hearing. (R1-93.) Feiler's wife, however, was entering a critical stage of her pregnancy, preventing his appearance as well. (R1-119-121.)

⁴ The Board's action was harsher than the Department's own recommendation that Poitier be permitted to reapply for licensure after one year. (R1-90.)

⁵ *See infra* pp. 30-36. *And see* Appendix, Exhibits E through J.

Judge Kirkland's recommendation and permanently revoked Respondent's license, doubled the administrative fine (to the maximum, \$2,000,00) and imposed administrative costs in the amount of \$1,521.61. (R1-125-126.)

On March 1, 2001, the Board entered its Final Order. (R1-124-128.)

On March 20, 2001, Poitier, represented by new counsel,⁶ filed a notice of appeal in this Court. (R1-149-150.)

However, because of the evidence of investigative misconduct that had come to light, Poitier and the Department continued to negotiate a settlement. Consequently, on April 4, 2001, this Court granted Poitier's motion to stay the final order.⁷ On August 8, 2001, this Court also granted Poitier's agreed motion to relinquish jurisdiction to permit the Board's reconsideration.⁸

On August 16, 2001, on the *Department's* motion, the Board met again to consider the permanent revocation of Poitier's license.⁹ At that hearing, Department counsel Charles Tunnichliff *himself* asked the Board to reinstate Judge Kirkland's recommended penalty.

On September 15, 2001, the Board affirmed its Final Order without

⁶ Poitier initially retained the law firm of Adorno & Zeder to represent him on appeal.

⁷ Appellant shall move to supplement the record on appeal with the Court's order.

⁸ *See supra* n. 7.

⁹ Undersigned counsel is in the process of securing a copy of the transcript of this hearing and shall move to supplement the record upon receipt thereof.

comment and referred the case back to this Court. Appendix, Exhibit B.

This appeal followed.¹⁰

STATEMENT OF THE FACTS

Introduction: The Administrative Complaint

On October 6, 1999, the Department filed a two-count Complaint against Poitier alleging essentially the following: Poitier agreed with Carlos and Rosa Alvarez to "transport and embalm the remains of the decedent [their mother, Basilia Suazo], and arrange for the funeral service for \$700.00." (R1-2.) When Poitier learned that the family did not have any money, he refused to accept installments payments, hold the funeral service or, most importantly, release Ms. Suazo's remains to Calvin Butler Jr. Memorial Funeral Home, with whom the Alvarazes had subsequently contracted. (R1-3.) The Complaint further alleged that when the family came to retrieve the remains, Poitier "became verbally abusive and vulgar" with the family and a Department Investigator, Clarence Ford, "ma[de] them wait," "blocked their entrance" into the funeral home and "yell[ed] obscenities." (R1-4-5.)

Characterizing his behavior as "unprofessional," "inappropriate" and without "justification," (R1-6), the Department accused Poitier of "negligence,

¹⁰ See Fla.Rs.App.P. 9.030(b)(1)(C) and 9.110(a)(3); Section 120.68, Florida Statutes (1997).

incompetence, or misconduct in the practice of funeral directing," as in violation of Section 470.036(1)(g), Florida Statutes (Count I), as well as "refusing to promptly surrender custody of the decedent's remains," a violation of Section 470.036(1)(p), Florida Statutes (Count II). (R1-1-9.)

The Hearing Before Judge Kirkland

Poitier's hearing on the Complaint was held before Judge Kirkland on June 21, 2000. Nine (9) witnesses testified: The Department called Carlos and Rosa Alvarez, Department Investigator Clarence Ford and Clifstonia Butler, of Calvin Butler Jr. Memorial Funeral Home. Poitier testified on his own behalf, as well as called Ellen Johnson, of Lincoln Memorial Cemetery, Kevin Rieth, of Panciera Memorial Home and Poitier employees Mike Norman and Tyrone Lamar. As described below, the facts that unfolded at the hearing conflicted significantly with those pled by the Department.

The Alvarazes Contact Poitier Funeral Home

Basilia Balerio Suazo died at Columbia Cedars Hospital on Wednesday, February 10, 1999. (R2-15, 110.) In order to arrange for the transport of her remains and funeral, on Monday, February 15, 1999, Ms. Suazo's son and daughter, Carlos and Rosa Alvarez, visited Poitier Funeral Home to engage its services. (R1-156; R2-15, 16, 44.) The Alvarazes appeared to speak and

understand English well.¹¹ Although each believed it was the *other* to whom the referral was made, the Alvarezes agreed that they came to Poitier through a neighbor who recommended him because of his "good service." (R2-30, 44.)

Neither of the Alvarezes recalled the financial terms of the agreement they reached with Poitier.¹² (R2-16, 45-46.) Indeed, Rosa Alvarez did not even recall signing the authorization for Poitier to take charge of the funeral. (R1-156; R2-17, 19.) Nevertheless, she did remember, as did her brother Carlos, that Poitier did not charge the family for the casket. (R2-19, 44, 49.) In fact, Poitier did not ask them to pay for embalming either -- traditionally a \$1,395.00 expense. (R2-51, 87.) Instead, Poitier told them they did not have to pay any amount of money for the funeral service, which he controlled, and that the only required payment would be for the burial service, *i.e.*, for the grave site at the cemetery.¹³ (R2-31, 51,

¹¹ Thus Poitier was startled when the Alvarezes both testified before Judge Kirkland on the condition they be assisted by a Spanish interpreter. (R2-5, 87-88.)

¹² In general they testified to their lack of recollection and "bad memory." (R2-16, 45-46.)

¹³ Carlos Alvarez confirmed Poitier's understanding:

Question (by the Department): Did Mr. Poitier ever tell you that you need to pay \$700 for a *cemetery plot*?

Answer: Yes, I think he talked to my sister, not to me about that, Rosa....

Question (by Poitier): You said I talked to your sister about a grave space for \$700, is that what you said right now; is that right?

Answer: Yes.

110.)

The funeral was planned for the coming Saturday, February 20, 1999. (R2-18.) Having made their initial arrangements, the Alvarezs turned their focus to the task of coordinating the arrival of approximately 10 relatives -- nine (9) from New York and one from Honduras, most of whom were in Miami by Wednesday, February 17, 1999. (R2-19, 26, 40, 49.)

On Friday evening, February 19, 1999, the day before the funeral was to take place, the Alvarezs, without money to pay *anything* toward their mother's burial, made their second visit to Poitier. Again, the Alvarezs do not recall a specific amount of money they owed, or to whom. (R2-47.) At that time, they proposed that Poitier accept payment contingent on Carlos Alvarez' worker's compensation settlement. (R2-20-21, 44-45.) Their offer was declined.¹⁴ Whereas Poitier often offered *his* services for free, he was unable to so negotiate

(R2-53-56, 61-62, emphasis added.) As often transpired during their respective testimonies, Carlos placed responsibility for details of the conversations with Poitier upon Rosa ("I didn't listen properly. My sister had more contact with him than I"). (R2-54.) Rosa did likewise in return. (R2-17-19, 21, 25-26, 28-29, 32, 35).

¹⁴ According to Rosa Alvarez, it was a Poitier *associate*, not Poitier himself, who informed the family that the funeral home could not accept this arrangement. (R2-21, 28.) She, though, could not even remember the name of the attorney. (R2-32.) According to Carlos Alvarez, Poitier *did* meet with them and, while agreeing to conduct the *funeral* service, said that he could not proceed with the burial without the Alvarez' paying the cemetery for the grave site. (R2-46.)

for the cemetery.¹⁵ (R2-46.)

Regrettably, with no money, and no alternative arrangements, the Alvarezes were unable to lay Ms. Suazo to rest on Saturday, February 20th, as planned.

The Alvarezes Solicit Panciera Memorial Home

The same day as the intended funeral, the Alvarezes consulted Panciera Memorial Home, to whom they had been referred by Carlos Alvarez' attorney. (R2-22, 47.) They could not recall the financial terms of that proposed arrangement either. (R2-22.) What was clear, however, was that Panciera also declined to perform the funeral free, despite *Poitier's* intervention on their behalf. (R2-22, 48.)

The Alvarezes Contact Butler Funeral Home

Desperate, on Sunday, February 21, 1999 -- the day *after* the funeral was to have taken place -- the Alvarezes contacted the Rebecca Butler and the Calvin Butler Jr. Memorial Funeral Home, which they located in the phone book. (R2-23.) Clifstonia Butler, owner of the Butler Funeral Home -- and Department witness before Judge Kirkland -- acknowledged that the Alvarezes had no funds,

¹⁵ Poitier was to pay for the entire funeral service, including preparing the body in the casket for the family to view the remains. (R2-116.) As he later testified, the family was informed thusly: "[S]ince you have a financial problem, I'm going to do the entire funeral free of charge. The only thing you have to come up with is the cemetery number of \$700 ... the grave side service is what the money had to be there for." (R2-115-116.) Poitier explained that in order for the funeral to proceed on Saturday as planned, the cemetery required payment before the grave is done, by Friday, February 19th. (R2-116.)

and would not have funds, for at least a month. (R2-130.) Nevertheless, Butler agreed to conduct the funeral entirely on credit. (R1-157; R2-23, 48, 130.)

That same Sunday evening, February 21st, Butler faxed an authorization to perform the services to Poitier Funeral Home.¹⁶ (R1-157; R2-131.) The next day, Monday, February 22, 1999, a Butler representative called Poitier and spoke with Mr Richardson, Poitier's funeral director. (R2-131.) Richardson had not been assigned to the Alvarezes and thus had little information to offer. (R2-131.) When Poitier himself could not be reached quickly enough, Rebecca Butler put it upon the *Alvarezes* to inform him of the new funeral arrangements. (R2-41.) Because of Butler's apparent animosity toward Poitier, the Alvarezes were told that Butler "no longer wanted to deal with him." (R2-41.) Irresponsibly, Butler left that important task to the family. (R2-41.)

Rosa Alvarez was also unable to reach Poitier right away. (R2-24-25, 41.) Thus, on Wednesday, February 24, 1999, she went to see Poitier, along with her brother, nephews and two (2) out-of-town visitors. According to her testimony, it was a Poitier *associate* -- not Poitier -- who declined to release Ms. Suazo's remains, demanded payment in the amount of \$700.00 and, failing that, directed that she and her family leave the property. (R2-25-26, 29.) While Carlos Alvarez also testified that the family did *not* deal with Poitier, he described the encounter

¹⁶ Butler was unable to pinpoint the time of day she sent over the release. (R2-137.)

altogether differently -- as "two individuals that were working for Mr. Poitier that *couldn't* [not *wouldn't*] get the body at the time at the moment."¹⁷ (R2-48.)

In the meantime, Butler contacted Quality Removal, Inc. to retrieve Ms. Suazo's remains. (R2-132.) According to Clifstonia Butler, Quality Removal's efforts were thwarted personally by Poitier, but this testimony was based on rank hearsay, and incorrect at that:

The young lady that answers the calls, *she'd* been calling to see if the body was ready, and every time *they* called *someone* told her it was not ready we never got the okay to make the removal. So I told them to just keep calling. We keep calling, we have to pay the removal service for every time they go over ... *[T]hey* went over and *they* said the body wasn't ready ... We sent the removal company over there. Every time the remover company called, Mr. Poitier was not there.

(R2-132-133, emphasis added.)

Regrettably, the Department did not call anyone from Quality Removal to testify, although arguably here was the only disinterested party with firsthand knowledge of Poitier's alleged discourtesy and withholding of the remains for payment. Had the Department done so, Judge Kirkland would have learned that Butler was entirely misinformed in this belief. For as Poitier later proved (R1-103-104), Quality Removal experienced no resistance from Poitier or his staff

¹⁷ As Poitier later testified, human remains may be released only by and to "legally authorized persons." (R2-48, 59.) Poitier presumed, therefore, that his staff was following the law rather than obstructing the Alvarezes from burying their mother.

whatsoever.¹⁸

The Department's Investigation Begins

Based on the foregoing, Rebecca Butler -- who also was not called to testify -- reported Poitier to the Department. (R2-33, 37-38, 68, 134.) Because her accusation was couched in rather incendiary language that Poitier was "holding a body for ransom," the Department was understandably aggressive from the outset. (R2-68.)

Investigator Ford's Testimony

The most damaging testimony against Poitier came from Investigator Clarence Ford, the Department's star witness, and someone who had an axe to grind against the accused.

Ford was first contacted on February 23, 1999, and promptly called Poitier late that afternoon. (R2-68.) According to Ford, "Poitier refused to release the body until paid \$700 for removal and embalming the body." (R2-69.) Ford testified that Poitier declined him both on the phone on the February 23rd and in

¹⁸ Giovanni Garcia, President of Quality Removal, provided an affidavit attesting that it was not until February 24, 1999 -- **three (3) days** following Butler's hiring by the Alvarezes -- that Butler contacted him to remove Ms. Suazo's remains. (R1-103-104.) By the time he arrived on the 24th, Poitier was already closed for the evening. (R1-104.) In express conflict with Butler's acrimonious testimony, and contrary to Judge Kirkland's Recommended Order, Garcia stated that he picked up the remains on February 25th without incident, adding:

At no time did I or anyone else from Quality encounter any difficulty with any Poitier personnel

(R1-104, emphasis added.) *And see infra* p. 26.

person on February 24th. (R2-69.) Ford testified further that on the morning of February 25th, an unprovoked Poitier "threw" Ford and the Alvarezes out of his facility. (R2-70.)

The truth of the matter is that *Ford* was the catalyst who fueled the fire begun by Butler. This secreted fact was of course well known to Ford -- as the record now reflects.¹⁹ Yet when questioned by Poitier, Ford not only denied cursing at and threatening Poitier and his staff, he refused to even acknowledge that Poitier had filed a complaint with the Department against him in this very case for *his* misconduct.²⁰ (R2-71, 73, 78, 79.) For the remainder of his testimony, Ford generally disavowed knowledge of the subject matter of nearly all of Poitier's questioning, curiously citing a lack of memory. (R2-75-77.) At the same time, Ford persisted to try and antagonize Poitier by repeatedly calling him "Reverend," but Poitier properly recognized the impropriety of the use of the title in that forum. (R2-75-78.)

Had Ford's past and present employment history been disclosed, his apparent ease toying with the unrepresented Poitier would have come as no surprise to Judge Kirkland. This case was not Poitier's first encounter with the investigator.

¹⁹ See *infra* pp. 31-33. And see Appendix, Exhibit E.

²⁰ Poitier's complaint was filed on December 17, 1999. The Department's Office of the Inspector General *sustained* the complaint in April 2000, two (2) months *prior* to Ford's testimony before Judge Kirkland. Appendix, Exhibit E.

Indeed, as Poitier alluded during the hearing, Ford had just recently abused Poitier over an unrelated matter, also in February 1999, and threatened to "kick his ass," "close [him] down" and "take [his] license." Appendix, Exhibit C. Poitier's letter notifying the Department of Ford's behavior underlies Ford's vendetta.

Yet each and every time Poitier unartfully attempted to cross examine Ford on his bias, the court sustained the Department's objection and forced Poitier to accept Ford's answers. (R2-71-80.)

Poitier's Testimony

Poitier testified on his own behalf. (R2-100-128.) He acknowledged that the Alvarazes admitted they had no funds to pay for anything. (R2-101.) Expressing sincere regret over any misunderstanding or miscommunication that evidently occurred between them, Poitier clearly recollected his offer to conduct the entire *funeral* for free, but not the *burial*. Poitier intended to provide all of *his* services for Ms. Suazo at no charge. (R2-62.) Any payment, on the other hand, was expressly for the cemetery plot, and this was going to have to come from the Alvarazes. (R2-62, 125.) As Poitier explained:

I don't demand anything because these are poor people.
I don't demand from poor people, let's clear that part.
Why demand from poor people? They didn't have it, I
give it to them. Poor people don't have monies in this
community, poor people I give it to them....

I do that for people every week. I do that for people.
It's no big deal for me. I'm the only one in the funeral

industry that furnishes everything for a family.

(R2-117, 121.)

Poitier also acknowledged that the family beseeched him to contract with their attorney to claim the necessary funds from Carlos Alvarez' worker's compensation settlement. (R2-103.) But when Poitier spoke with counsel -- in the family's presence -- the attorney could not guarantee payment, leaving Poitier without an alternative.²¹ (R2-103.) Poitier then explained to the family why payment for the burial service must be prepaid, that it is common practice not to even contact the cemetery until the money is in hand, for it is then that the process for digging the grave begins and the funeral service may continue. (R2-118.)

When the Alvarazes reported to Poitier they had consulted Panciera Memorial, he understood it was their desire that he hold off until hearing back from them. (R2-35-36, 121.) In fact, when the family came to see Poitier on Tuesday evening, February 23rd, they showed him a Panciera Arrangement Planner, prompting his reasonable belief that they were seriously considering that facility.²² (R2-35-36, 90, 120.) This was verified by Carlos Alvarez.²³ (R2-57.) Indeed, when asked whether he informed Poitier to stand by, Carlos Alvarez

²¹ The Department did not call the Alvarez' attorney to testify at the hearing.

²² Appendix, Exhibit D.

²³ Rosa Alvarez agreed but could not recall whether it was *she* who brought the Arrangement Planner to show Poitier. (R2-35.)

responded:

I was trying to get ready to make the funeral take place
the best way I can ... I tried to find *somebody* with a
kindness until I get the money to get the job done.

(R2-48-49, emphasis added.)

Based on the record evidence to this point, any alleged "delay" in turning over Ms. Suazo's remains to the Alvarezes was in no way due to Poitier's greed or misconduct, or any unprofessional, inappropriate, unjustified, negligent or incompetent behavior on his part.

Once Poitier became aware that the family contracted with Butler to take over the arrangements, he immediately took action himself. (R2-102.) His efforts to reach Butler by telephone on Monday, February 22nd, the day after Butler faxed its authorization, (R1-157), were unsuccessful. (R2-90, 102, 109, 121.) Ironically, for all the venom injected by Butler throughout the course of this entire matter, Poitier and Butler never spoke to each other a single time. (R2-121.)

Poitier also testified that from the moment Investigator Ford came into the case, he was rude, profane, racist, abrasive and threatening -- and demanded that Poitier "do like others do in order to save and protect his license." (R2-75-76, 103-105.) Poitier flatly denied Ford's claim that he refused to release Ms. Suazo's remains "until paid." (R2-122.) What Poitier *did* tell Ford was that "the *family* controls the remains," and the family, having contacted Panciera, had indicated for

him to wait. (R2-122, emphasis added.) Ford chose not to believe him. Yet rather than intimidate or threaten, Poitier simply insisted upon that which he felt he was duty-bound to oblige -- proper authorization to release remains. (R2-124.)²⁴

In any event, Poitier testified that no one actually came to pick up Ms. Suazo's remains until February 25th, when the Alvarezes were accompanied by Ford. Since Poitier was momentarily unavailable, the group was met by Tyrone Lamar, a Poitier security guard who, sensing their hostility, asked them to leave the premises and, allegedly, crudely refused to release Ms. Suazo. (R2-38-39.) Rosa Alvarez remained behind to speak with Poitier. (R2-38.) When he arrived, and learned what was unfolding, Rosa Alvarez testified Poitier yelled, "please leave [the] property." (R2-38.) Alvarez did *not* testify that Poitier expressly refused a request to release her mother's remains, let alone insist on payment before doing so.

As for Mr. Lamar, his alleged reaction, if true, was a knee-jerk, short-sighted, perhaps even immature. That a confrontation occurred is regrettable and, subject to the wise reflection of hindsight, never should have happened -- even irrespective of Investigator Ford's culpability -- and would never happen again.

But the gravamen of the Complaint and revocation of Poitier's license -- the

²⁴ As stated, Ford's mistreatment prompted Poitier to file his own complaint with the Department. (R2-104-105.) Appendix, Exhibit E.

express and discourteous refusal to release remains until paid -- was not *Poitier's doing*.²⁵ Both of the Alvarezs stated so. (R2-38-39, 51-52.) Thus, none of the Alvarez' testimony demonstrates that Poitier's conduct evinced a specific intent to cause grief to the bereaved, to hold remains for ransom or to prevent the burial of a loved one.²⁶

Later that same day, February 25th, Ford and the Alvarezs returned, this time accompanied by Rebecca Butler, Department Investigator Matthew Drummet and the proper paperwork authorizing the transfer. (R2-72.) When so presented, Poitier complied immediately. (R2-108-109.) Contrary to the allegations contained in the Complaint, Poitier never tried to "block" the door to the funeral home; nor was Investigator Drummet the lone person to burst through and enter. (R1-5.) Neither fact was true, and the Department elicited no such testimony. As Poitier vowed, "[t]he remains were not being held for ransom." (R2-109.)

Poitier's Rebuttal Case

Poitier called four witnesses on his behalf. The first was Ellen Johnson, of Lincoln Memorial Cemetery. Ms. Johnson confirmed that Poitier *does* give free

²⁵ This allegation was made by Investigator Ford alone. (R2-69.)

²⁶ Indeed, Poitier reminded the court that he alone possesses the legal authority at his facility to release remains; others are forbidden from doing so. Hence, irrespective of Lamar's handling of the situation, he *could* not authorize the removal of the body, as Carlos Alvarez recognized. (R2-48.) At Poitier Funeral Home, *Poitier* is the person licensed to do so. (R2-59.) Any decision on behalf of Poitier by one of his employees is just that -- a judgment call made on Poitier's behalf, not by the accused himself.

funerals to families -- paying for some of them out of his own pocket. (R2-63.) Johnson stated further that the \$700.00 charge at issue in this case was indeed for grave space, and that fee traditionally has to be prepaid. (R2-64.)

Poitier next called Kevin Rieth, funeral director at Panciera Memorial. Rieth testified that Panciera quoted the Alvarezes a package price of \$3,820.00, all of which was to be paid up front. (R2-65.) Rieth further stated that, as an industry practice, the only time installment payments are accepted is for a "pre-need" plan, whereby someone who is not deceased puts money "into a State trust or insurance plan regulated by the State of Florida to make it where they could make monthly payments or paid in full before the time in need." (R2-66.)

Poitier then called two of his own employees to testify. The first was Mike Norman. He confirmed that Poitier gives free funerals to families who do not have money, including the casket, vault, programs, flowers and use of the company limousine. (R2-86-87.) Norman also verified that late in the afternoon of February 23rd, he was informed him not to touch Ms. Suazo's remains until they had heard back from the Alvarezes and Panciera. (R2-83-84, 88, 94.) Norman too saw the Panciera planner, indicating that Poitier may not be completing the work. (R2-84.) Norman also corroborated two important items: First, prior to the 25th, no one from the Alvarezes came to pick up the body, (R2-85); and second, Investigator Ford was extremely abusive, calling Norman

"dumb," "stupid" and yelling, "I didn't know what I was doing." (R2-85.)

Poitier's final witness was Tyrone Lamar, one of his security officers. Lamar testified that the Alvarezes indeed called on Tuesday, February 23rd, around 4:30 or 5:00 in the afternoon, and that, as a result, Poitier informed him not to do anything with the remains until they heard back from them. (R2-98.) In fact, with regard to the possibility that Panciera was to take over the funeral arrangements, Lamar confirmed:

T[he Alvarezes] stated that they were on their way and they informed us not to do anything, not to do anything further with the body until they arrived.

(R2-96, emphasis added.) Lamar also corroborated Investigator Ford's misconduct. On the morning of the 25th, Lamar saw Ford and the Alvarez family arriving, accompanied by Rebecca Butler. (R2-97.) They immediately began raising their voices, causing Lamar simply to ask that they lower them. (R2-97.) Ford threatened Lamar, telling him he "better leave him alone." (R2-98.) Ford then "walked outside" and "continued talking to the family loudly." (R2-98.)

The Conclusion

Ultimately, on February 25th, when the Alvarez family was accompanied by Rebecca Butler and Department Investigators Ford and Drummet, presented the appropriate documentation, and Poitier was present, Ms. Suazo's remains were released without further incident. (R2-37.)

Ms. Suazo was finally laid to rest on Friday, February 27, 1999. (R2-26.) Unfortunately, three (3) of the Alvarez' 10 relatives had by then returned home to go to work. (R2-26-27, 49.) The Alvarez' eventually saw to it that Butler was paid in full. (R2-27.) Although Clifstonia Butler could not recall what she charged the Alvarezes, she believed it was over \$700.00.²⁷ (R2-129, 135-136.)

The Department's Proposed Recommended Order

Following the close of the testimony, Judge Kirkland issued a post-hearing order calling for both parties to submit proposed recommended findings of fact and conclusions of law. (R1-72-74.) The Department obliged, but mischaracterized much of the testimony that its witnesses provided. (R1-77-91.) In particular, the Department misrepresented that Poitier offered *only* to pay for the family's casket (R1-80); that Poitier promised the Alvarezes he had already paid for the cemetery plot (R1-81); that with the family present to retrieve Ms. Suazo's remains, Poitier placed them tantalizingly nearby on a stretcher (R1-82); that Quality Removal was prevented by "Poitier or his associates" from picking up the body (R1-82); and, of primary importance, that Poitier refused to release the remains to Butler until paid \$700.00 (R1-81).

On this last point, the exchange between the Department prosecutor and Rosa Alvarez is illustrative both of the Department's misrepresentation of the facts

²⁷ Good to his word, Poitier at no time requested payment for any of the work he performed prior to the time the remains were transferred to Butler. (R2-53.)

and the genuine specter of miscommunication that obviously arose between the parties -- as date and context melded into one:

Question: When was the last time you visited Mr. Poitier's Funeral Home?

Answer: I believe that was on the 25th, February the 25th.

Question: To his place of business?

Answer: Yes.

Question: Was anyone with you?

Answer: Yes, my brother came along, my nephews, and the two visitors.

Question: You asked for your mother's body to be released at that time?

Answer: I spoke with the front desk. I did not speak with Mr. Poitier because he was busy.

Question: Did he *ever* ask you to leave his property?

Answer: Yes, he told me to leave his property.

Question: Was your mother ever buried by Mr. Poitier?

Answer: No.

Question: Who performed the service on your mother?

Answer: Ms. Butler.

Question: Did Mr. Poitier ask you for money for the *embalming* that he had done?

Answer: I asked him if in order to *move* the body to another funeral home, whether he was going to charge anything. He said yes, it was \$700.

Question: It was \$700 before he would *release* your mother's body to Ms. *Butler's* Funeral Home?

Answer: Yes.

(R2-25-26, emphasis added.)

The Department also urged the court to find seven (7) aggravating factors, pursuant to Rule 61G8-30.001(6) of the Florida Administrative Code.²⁸ (R1-87-89.) Buried therein lay the Department's real argument -- *none* of it supported by the evidence, but its argument nonetheless:

Respondent thought that by threatening to cancel the funeral at the last minute, he could get the family to pitch in and pay for a funeral....

Respondent held the entire Alvarez family hostage, partly out of his dislike for Calvin Butler Funeral Home and the competition between the two funeral homes. The Alvarez family was a completely innocent victim in Respondent's power play....

The Respondent was the only one in control of this entire situation. He directed his employees not to allow the body to be removed without his consent, then made himself unavailable.

²⁸ Specifically, the Department argued that Poitier's conduct was aggravated by (a) the severity of the offense, (f) his years of service in this industry, (g) the "actual damage" he caused in the form of emotional and financial distress to the family, (h) the need for deterrence to teach Poitier that "his business practice ... is completely unacceptable and will not be tolerated by the Board," (j) Poitier's failure to rehabilitate himself (*i.e.*, admit the allegations against him), (k) Poitier's directing his employees not to turn over the remains without his consent and then "ma[king] himself unavailable" and (l) Poitier's failure to take action from the moment it received the Butler fax on February 21st until the release of the remains on February 25th. (R1-88-89.)

(R1-88-89.) Nothing in the record supported any of these allegations.

In accord with its undue characterization of the facts, the Department recommended that Poitier's license be revoked, but even then with leave to reapply after one year. (R1-90.) The Department further requested that Poitier be fined \$2,000 (the maximum, as each count carries a \$1,000 penalty) and pay \$1,521.61 in administrative costs, plus the costs incurred at the formal hearing. (R1-90.)

Judge Kirkland's Recommended Order

The court's findings of fact

Given the conflicting testimony, Judge Kirkland properly rejected the Department's venomous rendition, particularly when it came to determining the actual financial arrangements between the parties and the circumstances for which Poitier himself was responsible in the release of Ms. Suazo's remains. On October 19, 2000, Judge Kirkland issued her Recommended Order. Her most significant findings of fact are summarized below:

- ▶ "[N]either Rosa nor Carlos Alvarez can recall the specific amount which Poitier was going to charge." (R1-109.)
- ▶ Poitier offered to provide the casket for free. (R1-109.)
- ▶ On Friday, February 19th, "*someone*" from Poitier Funeral Home contacted the decedent's family to advise that the funeral was not proceeding the following day. (R1-110, emphasis added.)

► A Poitier associate spoke with the Alvarezes later that same day and advised that a payment plan contingent on a worker's compensation settlement would be unacceptable. (R1-110.)

► The Alvarezes sought out Panciera Memorial Home and brought a planner back to Poitier, prompting Poitier to *help* the Alvarezes by calling Panciera to see if they would conduct the funeral for free, to no avail. (R1-111.)

► During the week of February 22nd, Poitier related to Rebecca Butler that he "wanted to get paid, but the family did not have any funds." (R1-111.)

The court never concluded that Poitier expressly refused to release the remains -- specifically to Butler, or to the family -- "until" he was paid. And Rebecca Butler was not called as a witness by the Department.

► Quality Removal was unsuccessful in its attempts to get the body released. (R1-111.)

Although Appellant filed the Garcia affidavit prior to the court's issuing its Recommended Order, Judge Kirkland declined to consider it.²⁹ (R1-107-108.)

► During her first visit on February 25th, Poitier informed Rosa Alvarez that it would cost the family \$700.00 to remove the body.³⁰

²⁹ The Board, however, was well informed of this evidence at its February and August 2001 meetings.

³⁰ *But see supra* pp. 23-24, for the context in which Rosa Alvarez' statement was made.

Contrary to the court's finding, it was Poitier's security guard, Mr. Lamar, not Poitier, who told Alvarez that the family could not have Ms. Suazo's remains. (R1-113.)

► It was to *Investigator Ford* that Poitier allegedly refused to release the remains, on February 23rd, February 24th and, initially, on February 25th, respectively. (R1-112-113.) And it was on the 23rd in particular that Poitier supposedly "refused to release the body unless the Alvarezes paid him \$700." (R1-113.)

Investigator Ford thus became the Department's star witness against Poitier.

► When, on the second February 25th visit, Investigators Ford, Drummet and Quality Removal produced the appropriate paperwork to remove the remains -- a death certificate and demand to transport -- Poitier obliged immediately. (R1-113.)

The court's conclusions of law and recommended penalty

Upon these tempered findings of fact, Judge Kirkland concluded that the Department carried its burden to establish the allegations in the Complaint by clear and convincing evidence. (R1-114.) However, given all of the equities presented by this incident -- all of the rights and all of the wrongs, taking into consideration the grief caused to the Alvarezes as well as Poitier's long-standing record of

service to the community, and recognizing that human beings make mistakes in communication and judgment -- Judge Kirkland implicitly rejected the Department's austere portrait and its urging to find aggravating circumstances to revoke Poitier's license. Instead, the court recommended that Poitier serve one year of probation, pay a \$1,000.00 fine and costs in the amount of \$1,521.61 (plus the cost of the transcript of the final hearing). (R1-115.)

The Board's Deviation from the Recommended Order

Because of documented health conflicts, neither Poitier nor his then-counsel, Michael B. Feiler, were able to appear before the Board when it first met to render its Final Order on November 17, 2000. (R1-117, 119-121.) In Poitier's absence, the Board expressed its inclination to radically depart from Judge Kirkland's recommended penalty. The Board agreed, however, to reconvene on February 8, 2001. (R1-123.) Neither Poitier nor his counsel were able to attend that meeting either, and their written request for a brief continuance was denied. (R1-124.)

The Board issued its Final Order, incorporating in full Judge Kirkland's findings of fact and conclusions of law. (R1-125.) The Board then found three (3) aggravating factors to enhance Poitier's punishment: *First*, under Rules 61G8-30.001(6)(a) (severity of the offense) and (c) (repetition of offenses), and relying on fact paragraphs 8 through 15 of the Recommended Order, the Board determined that Poitier was unreasonable in "holding the body after receipt of a release

authorization." (R1-125-126.)

Second, under Rule 61G8-30.001(6)(g) (actual damage, physical or otherwise), and relying on fact paragraphs 2 through 6 and 14, the Board found that Poitier's "treatment of the Alvarezes was unreasonable."

Third, and finally, under Rules 61G8-30.001(6)(p) (any other mitigating or aggravating circumstances), (k) the actual knowledge of the licensee pertaining to the violation) and (l) (attempts by licensee to correct or stop violations, or refusal by the licensee to correct or stop violations), and relying on hearing testimony (R2-115, line 15, through R2-117, line 25), the Board concluded that Poitier's treatment of *Investigator Ford* was an aggravating factor as well, particularly Poitier's "refusal to release the body after being told that to do so was a violation of statute and throwing the inspector off the premises." (R1-126.)

Despite the Department's own request to reinstate Judge Kirkland's recommended penalty,³¹ as well as Poitier's making it expressly clear that the record failed to support any increase in sentence, the Board declined to modify Poitier's punishment, rejected the penalty recommended by Judge Kirkland and, "***based on the aggravating factors***," revoked Poitier's license *without* leave to reinstate.³² (R1-126, emphasis added.)

³¹ See *supra* p. 5.

³² The Board also doubled the recommended fine to \$2,000.00 and imposed administrative costs. (R1-126.)

In sum, Poitier received the maximum punishment the Board could muster.

The Truth About Investigator Ford and the Department's Substantiation of Poitier's Administrative Complaint

By the time the Board met to reconsider its Final Order -- first in February 2001 and then in August 2001 -- Poitier had secured counsel. More importantly, by that time, the truth about Investigator Ford had come to light. Appendix, Exhibits E through J.³³ Had Judge Kirkland been presented with this evidence, it is doubtful she would have embraced any of Ford's testimony. The court certainly would have permitted Poitier greater leeway on cross-examination. It is similarly doubtful that the Board could have, or would have, taken Ford's testimony into account to sustain Judge Kirkland's findings of fact, let alone aggravate Poitier's sentence.

Investigator Ford was *fired* by the Department on December 11, 2000 --
just six (6) months after Poitier's hearing -- a decision reached by the Department

³³ Counsel Feiler presented this evidence to the Board in February, but was informed that the Board would only reconsider that which was actually presented to Judge Kirkland. In August, the Board was again presented with this evidence, both by Poitier's new counsel, Gregory A. Victor of Adorno & Zeder, as well as Department counsel Charles Tunnickliff. There is no dispute that the Department, or at least one arm of the Department, was well aware of all of this information -- and thus the utter lack of its star witness' credibility. Presumably, prior to the June 2000 hearing, the Department prosecutors were not so aware, lest they surely would have revealed the same to Poitier and perhaps decline to permit Ford to perjure himself on the witness stand. In sum, by the time the Board convened to consider Judge Kirkland's Recommended Order, key Department personnel knew that Investigator Ford's testimony was unreliable and, in all fairness, should not have been considered against Poitier at all. It was for this reason that the Department itself urged the Board to reduce Poitier's sentence in August 2001.

during critical moments in which this case was pending.³⁴ His firing was prompted by a number of important factors:

► First and foremost, Poitier's December 1999 complaint against Ford for "Unbecoming Conduct" arising out of this incident was upheld by the Department's Office of the Inspector General. Appendix, Exhibit E. Following an investigation concluding on February 18, 2000 -- 4 months *prior* to Poitier's hearing -- the Inspector General found sufficient evidence to support the charge that Ford, precisely as Poitier had testified, displayed inappropriate behavior and used rude and profane language.³⁵ *Id.* In a sworn, taped interview with the Inspector General, Ford admitted his misconduct.³⁶ *Id.* To Judge Kirkland, to Poitier, to the Department and to the Board, Ford lied.³⁷

Investigator Drummet confirmed, as did five (5) Poitier employees,³⁸ that from Ford's earliest telephone contact in this case, he made rude and profane

³⁴ See Appendix, Exhibit J.

³⁵ By testifying that Ford "behaved professionally" at all times, the Alvarez' complicity calls some of their credibility into question as well. (R2-38, 60.)

³⁶ Ford initially denied Poitier's allegations at first. It was only after he was confronted with the considerable evidence against him, including his partner, Investigator Drummet's testimony, that Ford came forward and told the truth.

³⁷ Even Ford's accusation that Poitier used profane language toward him and the Alvarezes was unfounded. *Id.* For that matter, no testimony was elicited by the Department to prove up its allegation in the Complaint either. (R1-5.)

³⁸ Mike Norman and Tyrone Lamar, Poitier witnesses at the hearing, were among them.

comments to Poitier and his employees. *Id.* Poitier suffered the same abuse in person at the funeral home. *Id.* Drummet stated later that Ford blamed his erratic behavior on being diabetic. *Id.* This was not the truth, nor was the bulk of Ford's testimony. For example, it was predictably Ford who encouraged the Department to allege in its Complaint that Poitier "blocked" the entrance to the funeral home while only Drummet snuck inside and, when Drummet exited, "began yelling obscenities." (R1-5.) As stated, no such testimony was elicited at the hearing. Moreover, Drummet himself never acknowledged these "facts" before the Inspector General.

Perhaps most important was the Inspector General's conclusion that **"Ford may have misrepresented the truth in providing answers to questions involving alleged unbecoming conduct."** Appendix, Exhibit E. Had the Department called Investigator Drummet to the stand, this evidence should have then come to light. It should also have prompted a different conclusion by Judge Kirkland altogether.

For his conduct in this case, Ford was formally reprimanded on June 9, 2000 -- 12 days before his testimony against Poitier. *Id.* He was referred to the Department's Employee Assistance Program for "anger management" and warned:

Any further behavior of this nature may result in more severe disciplinary action.

Id.

But the Department's confirmation of Poitier's hearing testimony was just

the tip of the iceberg:

► By October 2000, while this case was under consideration, Ford was under investigation by the Inspector General for misconduct during an inspection of *another* funeral home, Funeraria Nacional Latina. Appendix, Exhibit F. In that case, Ford threatened to shut down Funeraria Nacional if he didn't get the information he was seeking regarding the authenticity of a license application as well as information on several deceased bodies. *Id.* Specifically, Ford was accused by Funeraria's funeral director, Frank Streeter, of threatening him physically should he not voluntarily relinquish his license -- an allegation very similar to Poitier's. *Id.* Ford's racial slurs and demand for Streeter's license was particularly egregious to the Department in light of Ford's having just been trained (on September 7, 2000) *not* to do that very thing. *Id.*

On December 1, 2000, the Inspector General sustained Streeter's complaint based on "clear evidence" of Ford's violations. The investigator's conclusion speaks volumes:

Together with Ford's previous disciplinary issues, this behavior calls into question his continued fitness for employment.

Id.

► In January 2000, another complaint was filed against Ford, this time for violating departmental policy by using his office computer to view

pornography. Appendix, Exhibit G. While Ford denied *using* his computer to access these files, the Department concluded that he had to have done so because no one else had used his password. *Id.* Caught red-handed, Ford confessed solely to attempting to "erase" the files. *Id.* The investigation concluded on February 18, 2000, while the Department held Poitier's fate in its hands. The complaint was sustained, and Ford was reprimanded on June 9, 2000. His hearing testimony against Poitier was just 12 days away.

► In his most recent performance evaluation prior to his firing, Ford's immediate supervisor noted that he "has had a difficult time in meeting his performance plan during this review period regarding the completion of cases assigned to him in a timely fashion." Appendix, Exhibit H. The "review period" began December 8, 1998, and thus incorporated Ford's investigation of the present case. *Id.* Ford received this evaluation on December 6, 1999, just as the Department's Complaint against Poitier was getting underway. *Id.*

► Finally, and importantly, on November 14, 2000, Ford was arrested for possession of crack cocaine, which he admitted to purchasing from someone off the street for personal consumption. Appendix, Exhibit I.³⁹ Ford failed to timely report his arrest to his Departmental supervisor. *Id.* He then failed to

³⁹ See Miami-Dade Circuit Court Case No. F00-36618. On November 20, 2000, Ford was placed on administrative leave pending the Department's internal investigation. Appendix, Exhibit I.

reveal the arrest during an interview by a Department investigator on the Frank Streeter, Funeraria Nacional complaint. *Id.* It was only after he "realized" what he had done that he came forward, to save his job. *Id.* At that time, he admitted that he had a "problem" and requested counseling. *Id.* Ford also alluded to the fact that he had "other personal problems that he need help coping with." *Id.* When asked why he failed to immediately notify his Departmental supervisor of his arrest, Ford confessed only "that he knew that he had let everyone down." *Id.*

Ford's criminal case is still open. He is presently in Miami-Dade Circuit Judge Jeffrey Rosinek's "drug court," unusual in that nearly two years have past since his arrest, and "drug court" is a year-long program.⁴⁰ Rather than his phantom diabetes, it was likely Ford's abuse of crack cocaine that better explains his aberrant, abusive, perjurious behavior against Poitier and his staff.

In sum, ex-Investigator Ford -- **the sole witness who alleged Poitier rudely refused to release Ms. Suazo's remains until paid** -- was fired for unbecoming conduct, insubordination, threatening and abusive language, violations of laws, rules, policies and procedures and for possession of drugs and drug abuse. Appendix, Exhibit J. Yet perhaps most significant is the Department's own recognition of Ford's perjury before Judge Kirkland. Appendix, Exhibit E. After all, Ford denied outright any animus on his part in all of his dealings with Poitier

⁴⁰ Ford is next scheduled to appear before the court on April 2, 2002.

and Poitier's staff, a falsehood which he persuaded the Alvarezes to join.⁴¹ Ford even had the temerity to deny *knowing* of Poitier's complaint, for which, incredibly, he had been reprimanded just 12 days earlier. *Id.*

Although the Department -- or at least an arm thereof -- was well aware of Ford's background, none of this information, especially that which was available at the time of the hearing, was disclosed to Poitier. Regarding the Department *prosecutors*, it is difficult to discern which is more troubling: Whether they knew of this evidence, failed to reveal it and persisted in relying on Ford as a credible law enforcement officer while objecting to Poitier's cross-examination, or whether they were not told of this evidence and permitted to travel blindly in the pursuit of Poitier's license? That the court took no responsibility to ensure Poitier was advised of his right to and the importance of counsel only exacerbated matters. Counsel, at a critical juncture, can make a world of difference.

If "justice must satisfy the appearance of justice"⁴² justice was not served here.

⁴¹ See *supra* n. 35.

⁴² *Offutt v. United States*, 348 U.S. 11, 14 (1954).

SUMMARY OF THE ARGUMENT

I.

Because a professional man or woman may be suspended or stripped of a license by an administrative board that performs the dual role of accuser and judge, a reviewing court must set aside agency action or remand the case to the agency if it finds that the agency's action depends on *any* finding of fact that is not supported by competent substantial evidence. Poitier is entitled to licensure because, on the record presented here, competent substantial evidence fails to support Judge Kirkland's findings, as incorporated by the Board, as well the Board's enhancement of Poitier's penalty based upon its determination of aggravating factors. Poitier is also entitled to relief because of the controversy surrounding the Department's star witness' testimony, which was neither disclosed by the Department, admitted by the witness or permitted to be questioned by the Court. In essence, these proceedings should be corrected because they failed to inspire public confidence in the integrity of the process.

II.

Independent of the insufficiency of the evidence, the Board's imposition of the maximum penalty was "arbitrary and capricious," particularly given the fact that the Department itself argued that an ulterior disposition was appropriate. Based on Judge Kirkland's assessment of the record evidence, probation alone was

punishment enough. Indeed, the Board has treated far more leniently others who admitted to conduct far worse than Poitier is alleged to have committed.

III.

Poitier is entitled to licensure because of the fundamental unfairness of the hearing he was accorded. The only witness to identify him as "holding remains for ransom" was Investigator Ford, whose testimony was utterly incredible. The Department, a State prosecuting agency, knew this, but failed to reveal anything to Poitier; Poitier knew, at least some of it, but the Department objected to all of his inquiries; the Court got an inkling, through Poitier's questioning, but curtailed his cross-examination nevertheless. A professional license ought not to be suspended on the testimony of one interested witness, especially when that one "star" witness displayed a blatant disregard for truth, law and procedure.

IV.

A licensee must be allowed a fair chance to prepare a defense. Although Poitier had an express right to counsel, the Court never apprised him of that right. For that matter, nor did the Department insist at least that a colloquy be conducted to satisfy the Court of Poitier's ability to represent himself. This was particularly offensive since the Department knew that revocation of Poitier's license was likely based on Ford's testimony, which it was soon to present. Poitier is thus entitled to licensure on this ground as well.

ARGUMENT

I. THE BOARD'S FINAL ORDER, INCLUDING ITS DETERMINATION OF AGGRAVATING CIRCUMSTANCES TO REVOKE POITIER'S LICENSE, WAS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

Standards of Review

A reviewing court shall set aside agency action or remand the case to the agency if it finds, without reweighing the evidence, that the agency's action depends on "any finding of fact that is not supported by competent substantial evidence in the record of the proceeding." *Miller v. State of Florida, Division of Retirement*, 796 So.2d 644, 646 (Fla. 1st DCA 2001); *Department of Agriculture and Consumer Services v. Bonanno*, 568 So.2d 24, 35 (Fla. 1990) (Ehrlich, J., dissenting). See also Section 120.68(10), Florida Statutes (1997); *Legal Environmental Assistance Foundation, Inc. v. Clark*, 668 So.2d 982, 987 (Fla. 1996); *Creel v. District Board of Trustees of Brevard Community College*, 785 So.2d 1285 (Fla. 5th DCA 2001); *Sumter Citizens Against Irresponsible Dev. v. Department of Community Affairs*, 730 So.2d 370, 372 (Fla. 5th DCA 1999); *Peden v. State Board of Funeral Directors and Embalmers*, 189 So.2d 526, 527 (Fla. 3d DCA 1966).

The court reviews an agency's interpretation of a provision of law *de novo*.

See Section 120.68(7)(d), Florida Statutes (1997); *Perdue v. T.J. Palm Associates, Ltd.*, 775 So.2d 660, 668 (Fla. 4th DCA 1999).

The court is also authorized to set aside agency action that does not comply with the essential requirements of law -- that is to say, if the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow proscribed procedures, so that a review of the entire history of the proceedings is not likely to inspire public confidence in the integrity of the process that resulted in the decision. *See* Section 120.68(7)(c), Florida Statutes (1997); *Barfield v. Department of Health, Board of Dentistry*, 805 So.2d 1008 (Fla. 1st DCA 2001); *Perdue v. T.J. Palm Associates, Ltd.*, 775 So.2d 660, 666 (Fla. 4th DCA 1999); *GTECH Corp. v. Department of the Lottery*, 737 So.2d 615, 622 (Fla. 1st DCA 1999).

Argument

Section 470.036, Florida Statutes (2000) empowers the Florida Board of Funeral Directors and Embalmers to revoke, suspend or otherwise discipline the license of a licensee who is "found guilty" of any ground enumerated in Section 470.036(1). To be "found guilty" is a solemn event in any context. Indeed, the United States Supreme Court has noted that even at common law, certain crimes stirred such a sense of insecurity in the whole community, so aroused public demand for retribution, that the infamy itself was that of a felony, which is "as bad

a word as you can give to man or thing." *Morissette v. United States*, 342 U.S. 246, 260, 72 S.Ct. 240, 248, 96 L.Ed. 288 (1952).

For this reason, statutes authorizing the revocation of a license to practice a business or profession must be strictly construed for they are penal in nature. *State v. Pattishall*, 126 So. 147 (Fla. 1930); *Davis v. Department of Professional Regulation*, 457 So.2d 1074, 1076 (Fla. 1st DCA 1984). As in any case, then, where the deprivation of liberty is on the horizon, whether a cause impacting licensure is properly pled, *see, e.g., Sternberg v. Department of Professional Regulation, Board of Medical Examiners*, 465 So.2d 1324, 1325 (Fla. 1st DCA 1985), and proved, *see, e.g., Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987), whether the accused is fairly prosecuted, *Dusseau v. Metro Dade County Board of County Commissioners*, 794 So.2d 1270, 1277 (Fla. 2001), and punished, *Davis v. Department of Professional Regulation*, 457 So.2d 1074, 1077 (Fla. 1st DCA 1984), are matters of great judicial, and societal, concern.

"[W]hen the proceeding may result in the loss of a valuable business or professional license, the critical matters in issue must be shown by evidence which is indubitably as 'substantial' as the consequences." *Bowling v. Department of Insurance*, 394 So.2d 165, 172 (Fla. 1st DCA 1981). Thus, "[i]n a proceeding under a penal statute for suspension or revocation of a valuable business or professional license, the term competent substantial evidence takes on vigorous

implications that are not so clearly present on other occasions for agency action under Chapter 120." *Bowling v. Department of Insurance*, 394 So.2d at 171 (vacating license revocation order).

In *De Groot v. Sheffield*, the Florida Supreme Court set forth the classic formulation of the competent substantial evidence standard:

We have used the term "competent substantial evidence" advisedly. Substantial competent evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings, the formalities in the introduction of testimony common to the courts of justice are not strictly employed. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that *a reasonable mind would accept it as adequate to support the conclusion reached*. To this extent the "substantial" evidence should also be "competent."

95 So.2d 912, 915-916 (Fla. 1957) (citations omitted; emphasis supplied); *Pollard v. Palm Beach County*, 560 So.2d 1358, 1359 (Fla. 4th DCA 1990).

Whether a "reasonable mind" would accept a fact as "adequate" is no abstract concept. Administrative boards must "base their determination upon facts which they find to have been established, instead of upon the wishes of persons who appear for or against the granting of the application." *City of Apopka v.*

Orange County, 299 So.2d 657, 659 (Fla. 4th DCA 1974). "Mere generalized statements of opposition are to be disregarded." *Marion County v. Priest*, 786 So.2d 623, 626 (Fla. 5th DCA 2001). Neither are the objections of even a "large number" of people a "sound basis for the denial of a permit." *Pollard v. Palm Beach County*, 560 So.2d at 1360.

The legal standard applicable to the Board cannot be viewed in a vacuum, however. Its application of the competent substantial evidence standard to Judge Kirkland's findings of fact and conclusions of law must necessarily be scrutinized under the burden of proof applicable below as well:⁴³

[T]he competent substantial evidence disclosed by the record which an appellate court may conclude furnishes adequate support for the board's decision must be gauged with due regard to the quantum of proof applicable on the trial level before the board. Therefore, it would appear to be a denial of due process of law for a quasi judicial tribunal trying an accused on certain charges of misconduct, to make a finding of guilt on the basis that in its opinion there is some competent substantial evidence to support such a finding.

Therefore, before a professional man or licensee such as involved in this case may be suspended or stripped of his license by an administrative board, the charges of misconduct leveled against him and on which he is tried by the board should be proved by clear and convincing evidence....

⁴³ The Board adopted in full Judge Kirkland's findings of fact and conclusions of law. (R1-125.)

In order to achieve due process of law in such trials before an administrative board, the quantum of proof should be equivalent to that which would be required if trial was in a constituted court, especially when, as in the case of such boards, the members thereof perform the dual role of accuser and judge.

Peden v. State Board of Funeral Directors and Embalmers, 189 So.2d 526, 528-529 (Fla. 3d DCA 1966) (Carroll, J., concurring specially).

Before the administrative judge, the Department bore the burden of proving the allegations in the Complaint against Poitier by clear and convincing evidence. *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987); *Evans Packing Co. v. Department of Agriculture and Consumer Services*, 550 So.2d 112 (Fla. 1st DCA 1989). Clear and convincing evidence has been described alternatively as evidence found to be "credible," "precise," "explicit," "lacking in confusion," "distinctly remembered" and producing in the mind of the trier of fact a "firm belief ... without hesitancy, as to the truth of the allegations sought to be established." *Evans Packing Co. v. Department of Agriculture and Consumer Services*, 550 So.2d at 116 n. 5; *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

The evidence presented against Poitier failed to satisfy either burden of proof. The Alvarez' testimony, though compelling, was severely conflicting, and did not identify Poitier to hold their mother's remains for "ransom." Ms. Butler's testimony as to Poitier's alleged offense was based on pure hearsay, which Poitier disproved. In any event, hearsay is insufficient in itself to support an agency

finding. Section 120.57(1)(c), Florida Statutes (1999). As for Investigator Ford's testimony, his bias and incredibility are as manifest as the perjury he felt free to commit.

Distinct from the failure of the evidence to support Poitier's finding of guilt, nor did the record support the Board's determination of aggravating circumstances, upon which its imposition of the maximum penalty was expressly based. (R1-126.) As discussed, evidence supporting both the conviction and penalty must be competent and substantial, "credible," "precise," "explicit" and "lacking in confusion." *Evans Packing Co. v. Department of Agriculture and Consumer Services*, 550 So.2d at 116 n. 5; *Slomowitz v. Walker*, 429 So.2d at 800. Witnesses must have "distinct memories." *Id.* And the trier of fact must possess a "firm belief ... without hesitancy, as to the truth of the allegations sought to be established." *Id.* The facts of this case do not inspire these levels of confidence. *See, e.g., Bevis v. State Board of Funeral Directors and Embalmers*, 279 So.2d 339, 340 (Fla. 1st DCA 1973) ("the evidence in this case not only does not support the determination of the Board ... but on the contrary, refutes the determination of the board as to any wrongdoing").

This Court is compelled to set aside agency action if it depends on "any finding of fact that is not supported by competent substantial evidence." *Miller v. State of Florida, Division of Retirement*, 796 So.2d at 646. Moreover, the Court

is authorized to correct agency action that, upon review, fails to inspire public confidence in the integrity of the process that resulted in the decision. *GTECH Corp. v. Department of the Lottery*, 737 So.2d at 622. In Poitier's case, based on this record, before a professional man may be suspended or stripped of his license by an administrative board that "performs the dual role of accuser and judge," *Peden v. State Board of Funeral Directors and Embalmers*, 189 So.2d at 529, the Court's oversight is rightly "vigorous," moreso then on "other occasions for agency action." *Bowling v. Department of Insurance*, 394 So.2d at 171.

For all of these reasons, Poitier's conviction should be reversed and his license reinstated.

II. THE BOARD'S SEVERELY INCREASED PENALTY WAS "ARBITRARY AND CAPRICIOUS"

Standards of Review

See supra Argument I, pp. 39-40.

Argument

Independent of the insufficiency of the evidence upon which Poitier was convicted and sentenced, the Board's disregard of Judge Kirkland's recommendation and imposition of the maximum penalty was unduly punitive.

Passing sentence involves more than a rote application of law. To be sure, an administrative agency may not increase a recommended penalty without a

review of the complete record and without stating with particularity its reasons therefor in the order by citing to the record in justifying the action. Section 120.57(1)(l), Florida Statutes (1999). But proceedings like these, although "summary in their nature," are not "arbitrary or despotic":

The court acts in the exercise of a sound discretion and according to law. The charges preferred ... should be specific, due notice of them must be given, and full opportunity afforded for an answer and a fair investigation on their merits. The consequences ... of a judgment disbarring him from the practice of his profession are serious enough to suggest such a course. His profession may be a source of great value to him, equal to any property rights which he may have, and the loss of it may inflict destitution and poverty upon himself and family.

State ex rel Fowler v. Finley, 11 So. 500, 503 (Fla. 1892) (discussing application of law to disbarment of attorneys).

Judge Kirkland's firsthand assessment of the relative credibilities of the witnesses presented is the better barometer by which Poitier's punishment should have been gauged. Judge Kirkland rejected most of the Department's portrayal of the incident. Consequently, she also rejected the Department's proposal that his license be revoked, albeit only for a year.

Based on this record, the enhancement of Poitier's penalty can only be deemed unreasonable, "arbitrary and capricious." *Lake Shore Mortuary, Ltd. v. State Board of Funeral Directors and Embalmers*, 305 So.2d 22, 23 (Fla. 3d DCA

1974). *See also Faircloth v. State Board of Funeral Directors and Embalmers*, 312 So.2d 222 (Fla. 1st DCA 1975). Indeed, several recent cases reported in the Fall 2001 issue of the Board's own newsletter demonstrates lesser sanctions imposed for conduct seemingly worse than that for which Poitier was adjudicated. *See, e.g.*, Case No. FE0003452 (January 9, 2001) (mere reprimand for failing to timely act to ensure release of remains).⁴⁴

III. DUE PROCESS COMPELS THE COURT TO REVERSE THE BOARD'S ORDER AND GRANT POITIER LICENSURE

Standards of Review

See supra Argument I, pp. 39-40.

Argument

Florida law ensures to one who may be denied a license basic due process protection. Due Process means "fundamental fairness." *Hampton v. United States*, 425 U.S. 484, 494 (1976). This essential requirement is specifically required by Chapter 120, as well as other provisions of Florida Statutes applicable

⁴⁴ *See also* Case No. FE0004309 (March 5, 2001) (probation for receiving monies or rebate for activities regulated under Chapter 470 and fraud in the conduct of the business or profession of the license); Case No. FE0001941 (October 10, 2001) (probation for failing to disclose truth about error in disposition of infant remains); Case No. FH0001331 (July 28, 2001) (probation where unlicensed person performed embalming and body was improperly embalmed); Case Nos. FE00003112, FE00003292 (October 18, 2000) (one year suspension followed by probation for failing to disclose truth about error in disposition of infant remains, permitting or failing to prevent employee from cremating infant remains without authorization, deliberately mislabeling cremains as the remains of another and allowing them to be given to the parent under the guise they were in fact their infant).

to administrative proceedings. *Dusseau v. Metro Dade County Board of County Commissioners*, 794 So.2d 1270, 1277 (Fla. 2001); *Schram v. Department of Professional Regulation*, 603 So.2d 1307, 1310 (Fla. 1st DCA 1992).

The case against Poitier boiled down to the testimony of Investigator Ford and his claim that Poitier rudely withheld remains until paid. Ford alone identified Poitier to commit the sinister acts. Based on Judge Kirkland's recommendation, the court arguably considered this to be a close case. Turning, as it did, on Ford's credibility, the new evidence uncovered by Poitier demonstrates beyond any reasonable doubt that Ford is incredible, and that the court's recommendation should have been radically different had the truth about Ford been disclosed.

Prosecutors are under a continuing obligation to disclose potentially exculpatory evidence. *See generally Brady v. Maryland*, 373 U.S. 83 (1963) (suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution); *United States v. Agurs*, 427 U.S. 97 (1976) (government's obligation extends even where defendant fails to request favorable evidence); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (government obliged to disclose all favorable evidence "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"). The Department failed

Poitier miserably in this regard.

The Department's sole reliance on Ford to convict Poitier in itself warrants reversal. This Court has previously held it is "self-evident that a professional license ought not to be suspended on the testimony of one interested witness." *Davis v. Department of Professional Regulation*, 457 So.2d 1074, 1077 (Fla. 1st DCA 1984). And see *Robinson v. Florida Department of Dentistry*, 447 So.2d 930 (Fla. 3d DCA 1984) (reversing license suspension predicated on testimony of one dentist employed by complainant after he left petitioner). This is especially true when that "one interested witness" is the prosecutor's "star" witness, and whom the court precluded the accused from cross-examining as to bias at every turn. *Livingston v. State*, 565 So.2d 1288, 1291 (Fla. 1988) ("limiting the cross-examination of a sole witness or star witness constituted reversible error"); *Schlotterlein v. State*, 683 So.2d 568, 571 (Fla. 5th DCA 1996) ("Where the case is 'close,' because the evidence to convict is not overwhelming, and the case turns on conflicting testimony, reversal is the only way to ensure the defendant of a fair trial") (Sharp, J., dissenting). Ford's untouchable testimony sealed Poitier's fate.

Poitier, therefore, should not be subjected to a new hearing:

Decency, security and liberty alike demand that governmental officials shall be subjected to the same rules of conduct that are commands to the citizen. A government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for

ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine, this Court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

Poitier should be reinstated. Ford's blatant disregard for truth, law and procedure requires nothing less.

IV. THE COURT'S FAILURE TO INQUIRE INTO POITIER'S LACK OF COUNSEL WARRANTS REVERSAL

Standards of Review

See supra Argument I, pp. 39-40.

Argument

"In license revocation proceedings, case law requires strict construction of statutes and specificity of charges," and a licensee must be allowed "a fair chance to prepare a defense." *Davis v. Department of Professional Regulation*, 457 So.2d at 1077-1078. *See also Hickey v. Wells*, 91 So.2d 206 (Fla. 1957) (reversing suspension where charges lacked requisite specificity).

Under Section 120.57(1)(b), Florida Statutes (1999), Poitier had a right to

be represented by counsel before Judge Kirkland. To some extent, that responsibility does fall on his shoulders. However, the record does not reveal a single instance where anyone advised him of that right to counsel, not even a colloquy to ensure the wisdom of his self-representation. This was particularly foul given that the Department knew far better than Poitier that with Ford's testimony, the revocation of Poitier's license was on the horizon. The right to counsel is empty indeed without the attachment of a remedy when one is underinformed, misled or embarrassed -- in other words, hindered in the preparation of his defense.

Given all that has transpired in this case, particularly the Department's acknowledgement of an outcome whose confidence has been undermined, Appellant respectfully suggests that the lesson has been well learned, and the time has come to put this matter to rest and return to work. No one can return the peace of mind the Alvarizes sacrificed in order to bury their mother. No litigation can bring salve to that wound. At this juncture, "[t]he best we can hope for is to encourage wise reflection -- through strict scrutiny of any government action or deliberate omission that appears to transgress what it means to be human at a given time and place. Nothing less will yield a language and structure for creating a future continuous with and contiguous to the most humane designs of the past." *Tribe, American Constitutional Law* 1308 (3d ed. 2000).

CONCLUSION

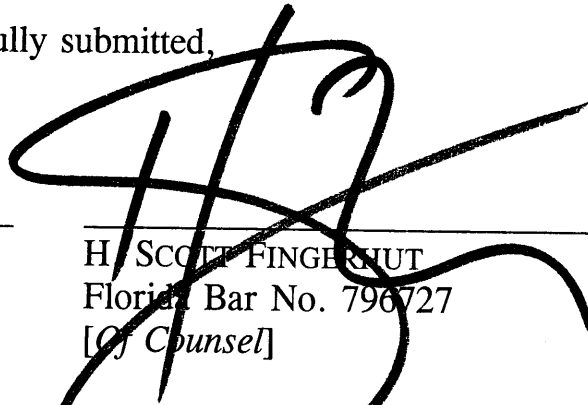
For all of the foregoing reasons, the Court must reverse the Board's decision to revoke Poitier's license and remand either with directions to reinstate him or for a *de novo* hearing upon the Complaint.

Respectfully submitted,



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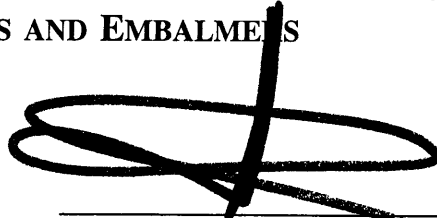
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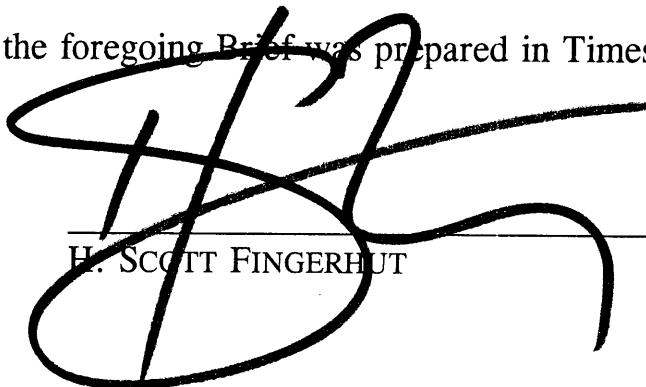
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CERTIFICATION OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that the font requirement of Fla.R.App.P. 9.210(a)(2)
has been complied with and that the foregoing Brief was prepared in Times New
Roman 14-point font.



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