IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JONATHAN STEPHEN SCHWARTZ,

Respondent.

_____/

Supreme Court Case
No. SC17-1391

The Florida Bar File
No. 2016-70,106(11J)

THE FLORIDA BAR'S INITIAL BRIEF ON APPEAL

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SYMBOLS AND REFERENCES

In this brief, Complainant will be referred to as "The Florida Bar," or as "the Bar." Jonathan Stephen Schwartz, Respondent, will be referred to as "Respondent."

References to the Report of Referee shall be by the symbol "ROR" followed by the appropriate page number (e.g., ROR: 12). References to the transcript of the final hearing will be by the symbol "Tr.," followed by the volume and the appropriate page number (e.g., Tr. III: 289).

References to the Bar's trial exhibits shall be by the symbol "TFB Ex.," followed by the appropriate exhibit number. References to Respondent's trial exhibits shall be by the symbol "Resp. Ex.," followed by the appropriate exhibit number.

For ease of reference, several trial exhibits, or portions thereof, have been included in the accompanying appendix, and references thereto shall be by the sequence number (e.g., A1).

PRELIMINARY STATEMENT

This disciplinary proceeding raises the important question of what measures a criminal defense attorney may ethically employ when challenging a victim's out-of-court identification.

Respondent, Jonathan Steven Schwartz, represented a client accused of armed robbery. The victim identified Respondent's client as the perpetrator from a police-assembled six-person photo line-up; Respondent, however, believed the identification was mistaken. In preparing for the victim's deposition, Respondent and his staff manipulated a copy of the police line-up provided by the State. They swapped out the face of the defendant for that of an alternative suspect and created two altered line-ups. During the deposition, Respondent asked the victim if she could identify the perpetrator from these altered line-ups, which still contained the victim's name and signature, the detective's name and signature, and reflected a positive identification of the photograph now containing the alternative suspect's image.

Though the witness did not make an identification, the prosecutor filed a motion for sanctions, and later a bar grievance, alleging Respondent attempted to create evidence by deceiving the witness into identifying the alternative suspect as the perpetrator.

Following a probable cause finding, The Florida Bar filed a formal Complaint alleging Respondent's creation and use of the line-ups constituted deceptive and dishonest conduct in violation of Rules 3-4.3 and 4-8.4(c). A final hearing was held on April 4 and 18, 2018.

The resulting referee's report found Respondent not guilty of the charged violations. The Referee concluded that Respondent acted without any intention or purpose to deceive and was instead conducting a legitimate and constitutionally allowable challenge to the victim's identification.

With this brief, the Bar seeks review of the Referee's findings of fact and conclusions as to guilt.

STATEMENT OF THE CASE AND OF THE FACTS

I. Introduction: *State v. Woodson*

In 2013, the State of Florida charged Virgil Woodson with armed robbery after he allegedly accosted Gerdie Tellisma in a parking lot, stripping her of her money and car keys at gunpoint. (Tr. I: 65, 70). Tellisma later identified Woodson as the perpetrator from a police-assembled six-person photo line-up. (A1; TFB Ex. 2). Tellisma's identification, coupled with Woodson being found in possession of her property, constituted the principal evidence against him. (Tr. III: 324).

Respondent believed that another individual—Fritzlan Joseph—was the actual perpetrator. In support of his theory of defense, Respondent produced several witnesses, including Joseph's ex-girlfriend, to testify that Joseph had confessed to the crime. (Tr. III: 327-28). He also seized on a typed letter sent to Tellisma, purportedly written by Joseph's mother, acknowledging that Joseph was the robber. (Tr. III: 329, 342-44). Finally, Respondent filed a motion to suppress the line-up identification, arguing the backdrop used for Woodson's photo, along with his head size, rendered the line-up unduly suggestive. (Resp. Ex. C; Tr. III: 346).

In December of 2014, prosecutor Cristina Cabrera was assigned to the case. (Tr. I: 64). She took the deposition of Joseph's ex-girlfriend, but did not find her testimony or the testimony of the other defense witnesses credible. (Tr. I: 67, 69). In

her mind, their version of events did not match up with what had occurred. (Tr. I: 69). For instance, despite the victim having received a letter indicating Joseph was responsible for the robbery, Cabrera pointed to Tellisma's claim that Woodson's family had approached her in her parking lot to apologize for his actions. (Tr. I: 66-67).

Respondent, however, adamantly believed in Woodson's innocence and felt Cabrera interpreted anything interfering with strength of the State's case as a personal insult. (Tr. III: 334-35). Having reached an impasse on plea negotiations, and with the parties' continuances ending, the last step in preparing the case was to complete Tellisma's deposition. (Tr. I: 66; Tr. III: 346).

II. Tellisma's Deposition

Tellisma's deposition took place on February 13, 2015 in the cramped quarters of Cabrera's office. (Tr. I: 73; Tr. III: 341.) Present were Tellisma, Respondent, Cabrera, Respondent's associate, an intern for the State, and the court reporter. (Tr. I: 73; Tr. II: 232-33). Since Ms. Tellisma could not speak English, a Creole interpreter also attended. (Tr. 1: 73; Tr. II: 233).

Turning quickly to Tellisma's out-of-court identification, Respondent began questioning her using his first altered line-up:

> Q: Now later, the police officer showed you what they call a photographic lineup; do you remember that?

A. I remember they give me the lineup.

Q. And do you remember – huh? You remember they showed you a lineup?

A. Yes, I remember.

Q. Was it like a piece of paper like my Exhibit Number Two over here? Was it a piece of paper like that or was it on like a cardboard inside like a boxed set?

A. It was on a piece of paper like that.

Q. A piece of paper like this?

A. Uh-huh.

Q. Let me show you what's been marked as Exhibit Number Two.

A. Now forget about what you did before. Now, I just want you to to look at Exhibit Two.

(TFB Ex. 1: 25).

Exhibit Two was a photo line-up, identical in almost every respect to the police-assembled line-up the State had turned over in discovery, except for one crucial difference—Respondent substituted Joseph's face for Woodson's (A2; TFB Ex. 3; Tr. III: 359, 364-65). He and his staff had printed off a Facebook photograph of Joseph, reduced it, taped it on top of Woodson's photograph on the police line-up, and then copied it. (Tr. III: 425). In every other detail, the line-up was identical to the one provided by the State: it included Tellisma's name and signature; it

included the name and signature of the detective who administered the identification; it contained Tellisma's hand-drawn circle around the individual depicted in photograph no. 5; and it indicated a positive identification had been made on May 11, 2013. (Tr. III: 364-65).

At this point, Cabrera asked Tellisma whether the line-up shown to her by the police was in color or black and white. (TFB Ex. 1: 25-26). After Respondent chastised Cabrera for interrupting his questioning, Tellisma indicated that she could not remember. (TFB Ex. 1: 26-27).

Respondent then proceeded:

> Q. Now, some of the pictures they showed you and you did not identify and some of the pictures you did identify; do you remember that?
>
> A. No.
>
> Q. You do not, okay, no problem. Let me show you Exhibit - -
>
> A. They show me only one picture.
>
> Q. Only one, no problem. Let me show you Exhibit Two and just ask you to look at it and just ask you to pick out the person, if you know, who was the one who robbed you; if you can tell me.
>
> And look at the pictures really carefully now. And if you're sure, then tell me if you can recognize or you can identify who was the person who robbed you on that day. If you can tell from this copy. If you can, you can. If you can't, you can't.

(TFB Ex. 1: 27-28).

In her testimony at the final hearing, Cabrera explained that Tellisma looked confused when Respondent first presented her with Exhibit Two. (Tr. I: 82-5). Cabrera was herself perplexed, thinking Respondent's line-up was simply a copy of the police line-up turned over by the State. (Tr. I: 89, 90, 152). Conversely, Respondent testified that the original line-up was in color, implying that neither Cabrera nor Tellisma could have confused his line-up for the original. (Tr. III: 354-55).

Cabrera also testified that Respondent presented the line-up to Tellisma before she had a chance to review it, and that she had to literally get up from her chair and take the line-up from him to inspect it. (Tr. I: 88, 89, 152). In contrast Respondent, along with his associate, Jodi Baker McGuire, and the court reporter, testified that the exhibits were marked in the normal course and Cabrera had ample opportunity to review them. (Tr. II: 230-31, 238-40; Tr. III: 382, 386, 467-68).

Regardless, upon examining the line-up, Cabrera realized that the photograph of Woodson had been "photoshopped," although everything else on the line-up remained identical to the police line-up. (Tr. I: 89). Ultimately, Tellisma was unable to make an identification from Exhibit Two—she indicated instead that the person who looked most like the perpetrator was in photograph no. 1. (TFB Ex. 1: 28-29).

Respondent then presented Tellisma with Exhibit Three, another photo line-up which was nearly identical to Respondent's first line-up (and, by extension, the State-provided line-up). (A3; TFB Ex. 4). For this line-up, however, Respondent had his associates remove Woodson's face and paste over it a smaller image of Joseph's face, thereby preserving Woodson's hair. (Tr. III: 425-26).

After asking Respondent to let her review Exhibit Three before he showed it to Tellisma, Cabrera stopped the deposition. (TFB Ex. 1: 29). She testified that she again had to physically take the exhibit out of Respondent's hand and, upon reviewing it, realized that this line-up had also been altered. (Tr. I: 94-96). During an off-the-record conversation, Cabrera claimed that when she asked Respondent where he had acquired the line-ups, he refused to answer. (Tr. II: 144). But Respondent and McGuire testified he willingly informed Cabrera that he had created the line-ups and that they featured Joseph in place of Woodson. (Tr. III: 390, 465-66).

Following this conversation, Cabrera went back on the record to lodge the following objection:

> Okay, so let me just put this on the record. Mr. Schwartz is showing the victim, Ms. Tellisma, Exhibits Two and Three, I guess for the deposition and the state is objecting to this line of questioning regarding these exhibits.

Photo number five is significantly different from the photo lineup that was provided by the state from the police officers and it appears that –

Mr. Schwartz:

And she didn't identify the person.

Ms. Cabrera:

Let me finish. And it appears that at the bottom of Exhibits Two and Three, there's a handwriting from the detective and from Ms. Tellisma where she selected photo number five, so I think this is extremely misleading. And Mr. Schwartz is asking to have Ms. Tellisma identify who was the robber in this case based on Exhibits Two and Three and this is not, you know –

(TFB Ex. 1: 29-30).

Despite Cabrera's objection, Respondent continued by asking Tellisma:

Q: All right, let me show you now Exhibit Number Three and just ask you to look at them as if you've never seen them before, because I don't know whether you have or not. And the same question I asked you as Exhibit Number Two.

(TFB Ex. 1: 30-31).

At that point Cabrera again stopped the deposition, took a brief recess, and returned to recite the following objection:

We can go back on the record. Just so it's clear, the state would be objecting to any line of questioning regarding Exhibits Two and Three. It's very misleading. Our victim is not required to make an identification in the deposition. If you can translate to her, so she understands.

> And by trying to make the witness do this identification, you're trying to create evidence, so I'm going to keep objecting. I ask, Mr. Schwartz, that you refrain from this line of questioning and continue on something else. If you're going to continue with this, I will continue objecting on the record.

(TFB Ex. 1: 32).

Respondent ceased questioning Tellisma regarding the second altered line-up and instead asked her if she remembered the police showing her a third line-up, introduced as Exhibit Four. (TFB Ex. 1: 32-35). This line-up, unlike the previous two, was an unaltered version of a second police line-up from which Tellisma had not made an identification. (A4). It did not contain a photograph of either Joseph or Woodson, not did it reflect any markings suggesting an identification.

Respondent then showed Tellisma individual pictures of Joseph and his mother, specifically asking if Joseph was the one who robbed her (and telling her Joseph's ex-girlfriend claimed to have heard Joseph confess). (TFB Ex. 1: 35-38).

After Cabrera objected, Respondent withdrew his question and concluded the deposition:

> All right, I don't have anything further. I appreciate it. I assume every witness of mine reads. No problem. Good to see you. We're done. That's it. Perfect. Thank you very much. Okay, thank you.

(TFB Ex. 1: 38).

After Respondent exited the room, Cabrera made the following statement:

> For the record, this is ASA Cabrera. I just wanted to put on the record that after Jonathan Schwartz asked the victim his last question, he immediately got up and left without giving me an opportunity to do cross examination on this deposition and I'll be bringing this up to the court. All right, thank you.

(TFB Ex. 1; 38-39).

At the final hearing, Respondent testified that he did not hurriedly leave Cabrera's office and insisted his exit was not an attempt to prevent her from questioning the witness. (Tr. III: 400-01). McGuire echoed this claim, insisting Respondent was respectful throughout the deposition. (Tr. III: 469). In her testimony, the court reporter concurred. (Tr. II: 245-46).

III. Subsequent Events

After discussing Respondent's actions with her supervisor, Cabrera filed a motion for sanctions. (Tr. 1: 97). The motion accused Respondent of altering the State-provided photo line-up in an attempt to trick or deceive Tellisma into identifying Joseph as the perpetrator. (A5: 1). The State argued *inter alia* that Respondent's actions were contrary to *State v. Kuntsman*, 643 So. 2d 1172 (Fla. 3d DCA 1994), which held that—absent strong or compelling reasons—a prosecution witness cannot be compelled to view a photo array created by the defense. (A5: 16-17). Asserting that Respondent tried to create evidence—i.e., a misidentification—the State sought to strike Tellisma's deposition, prohibit Respondent from re-

deposing the victim, disqualify him from representing Woodson, and refer the matter to The Florida Bar. (A5: 18). Believing the motion lacked merit, Respondent deemed it unworthy of a response. (Tr. III: 410).

Both Respondent and McGuire testified that Cabrera "high-fived" another prosecutor after filing the motion, saying something to the effect of "we've got him." (Tr: III: 405, 474). Cabrera denied this, and insisted she harbored no personal animus toward Respondent. (Tr. 1: 99, 106). Still, fearing potential repercussions for his client, Respondent transferred primary responsibility of the case to McGuire. (Tr. 407-08).

On March 25, 2015, Cabrera and McGuire resolved Woodson's case for a youthful offender "boot camp" plea. (Tr. I: 100; Tr. III: 408-09). When the court inquired whether the parties wanted the motion for sanctions set for hearing later in the morning, Cabrera responded, "Oh Judge. With that motion, because we're resolving with a plea at this time, the State will be withdrawing the motion." (Resp. Ex. D: 24).

Respondent claimed the judge had signaled that he would be denying the motion, and that Cabrera's withdrawal was an intentional act to deprive the presiding judge of jurisdiction. (Tr. III: 413). But, when the Referee inquired if Respondent

could explain what he meant by "signal," he admitted he had no evidence to support his contention. (Tr. III: 413).

With the Woodson case closed, Cabrera, along with a fellow prosecutor, filed a grievance with the Bar mirroring the allegations raised in the motion for sanctions. (Tr. I: 102-3; TFB Ex. 5). Following a grievance committee investigation and finding of probable cause, the Bar filed its formal Complaint and the matter proceeded to a final hearing on April 4 and 18, 2018.

IV. Final Hearing

In addition to Cabrera's testimony, the Bar introduced several documents, including Tellisma's deposition transcript (TFB Ex. 1), a copy of the police assembled line-up provided by the State in discovery (TFB Ex. 2), and copies of the two altered line-ups Respondent used during the deposition (TFB Ex. 3 and 4). The Bar also introduced Cabrera's sworn correspondence to the Bar, which included an affidavit from Cindy Ferreiro, the intern who attended Tellisma's deposition. (TFB Ex. 5).

In her affidavit, Ferreiro averred that Respondent presented the line-ups to Tellisma without first showing them to Cabrera and then ignored Cabrera's request to view them. (A6: ¶ 6). Ferreiro also claimed that when Cabrera left the room during a recess, Respondent continued to ask Tellisma questions. (A6: ¶ 8). Finally, Ferreiro

stated that Respondent quickly left Cabrera's office when he had finished his questioning. (A6: ¶ 9).

Beyond his own testimony and that of McGuire and the court reporter, Respondent called local criminal defense attorney Barry Wax as an expert witness. Wax, who had previously represented Respondent in disciplinary matters (and was actively representing him in an unrelated disciplinary matter at the time of the final hearing) (Tr. II: 260, 290-92), testified to his understanding of the law regarding the use of line-ups. Wax explained that the cases of *Kuntsman* and *State v. McWilliams*, 817 So. 2d 1036 (Fla. 3d DCA 2002), were the relevant authorities—the former setting forth the proper procedure for defense counsel to use a defense created lineup, and the latter authorizing defense counsel to question a witness using a police line-up. (Tr. II: 265-69). In Wax's opinion, Respondent's creation and use of the two altered line-ups complied with *Kuntsman* and *McWilliams* and did not constitute an act of deceit, dishonesty, or misrepresentation. (Tr. II: 275-77, 286).

On cross-examination, however, Wax acknowledged that *McWilliams* did not hold that is was permissible to question a witness using an *altered* police line-up and stated the precedent was "inapposite" to the instant facts. (Tr. II: 293-94). Instead, Wax pointed to *Kunstman* and tried to articulate a difference between the prohibited act of using a defense line-up to create evidence ("i.e., a misidentification") and

Respondent's goal of obtaining an "accurate identification." (Tr. II: 295). Although admitting that Respondent's line-ups did posed a risk of misidentification, Wax insisted that was not Respondent's goal. (Tr. II: 296). Instead, he defined Respondent's intent as "trying to get an identification of an individual who had been implicated in committing this crime." (Tr. II: 296).

V. Report of Referee

Although the uncontested evidence reflected that Respondent, along with his staff, deliberately altered the police-assembled line-up provided by the State to create the line-ups at issue, the Referee found that he "acted without any purpose or intention to deceive." (ROR: 4). In fact, she concluded he "made no misrepresentation whatsoever in the course of his conduct." (ROR: 4). Instead, the Referee found that the purpose behind Respondent's manipulation of the line-up was to "test the witness's identification of the defendant as the perpetrator" and "redirect the state's attention to an alternate suspect." (ROR: 5, 7). Consequently, the Referee concluded that Respondent's use of the altered line-ups did not constitute dishonesty, deceit or misrepresentation, nor was it contrary to honesty or justice. (ROR: 28).

In support of this conclusion the Referee made the following findings:

- The altered line-ups were not themselves misleading or contrary to justice, nor was their manner of use capable of misleading the witness. (ROR: 23).

- Respondent made "proper explanations" and gave "appropriate cautionary instructions" when questioning Tellisma about the altered line-ups. (ROR: 4).

- Respondent "properly and carefully" identified his altered line-ups as defense exhibits "without the slightest misrepresentation." (ROR: 23).

- And, Respondent acted consistently with *Kuntsman* and *McWilliams.* (ROR: 23).

The Referee rooted these findings in the "forthright" and "honest" testimony of Respondent and his witnesses versus the "troubling" and "evasive" testimony of Cabrera. (ROR: 4, 20, 21). For example, the report found fault with Cabrera's withdrawal of the motion for sanctions, which it characterized as:

> [M]otivated by an intention to move the complaint from one jurisdiction familiar with similar cases to a forum less likely to promptly and efficiently resolve the matter by instituting grievance proceedings that can be more lengthy to an offending lawyer.

(ROR: 22).

Instead of letting a circuit court judge resolve the matter, the Referee found that Respondent was punished by the "lengthy and expense procedures this grievance proceeding has entailed." (ROR: 8).

Conversely, the report lauded Barry Wax's "compelling" evidence that Respondent acted in accord with Florida law and the Rules of Professional Conduct (ROR: 20); McGuire's belief that none of the line-ups were misleading or deceitful

(ROR: 17); and the court reporter's testimony that Respondent did not mislead the witness or hide the exhibits from Cabrera (ROR: 19).

As for Respondent, the Referee fully credited every aspect of his testimony. The report dismissed his disciplinary history (which included violations for lack of candor, dishonesty, and misrepresentation), finding it did not "involve conduct that weighs on the Referee's findings of fact in this matter." (ROR: 9). The report also accepted Respondent's affirmative defense, namely, that he acted "within the bounds of the United States and Florida Constitutions." (ROR: 28). Finally, citing Respondent's belief that his use of the altered line-ups was "open and transparent," the Referee concluded his conduct could not sustain a violation of Rules 3-4.3 and 4-8.4(c). (ROR: 23, 28).

Having found that Respondent acted without any purpose or intent to deceive during the course of Tellisma's deposition, the report distinguished the instant case from this Court's long-line of disciplinary case law sanctioning lawyers for misrepresentation during the discovery process. (ROR: 23-27). Since no case explicitly prohibited Respondent's specific conduct, the Referee essentially rejected the application of any case law.

SUMMARY OF ARGUMENT

Rules 3-4.3 and 4-8.4(c), collectively, prohibit attorneys from committing an act that is unlawful or contrary to honesty and justice, or engaging in dishonesty, deceit, fraud, or misrepresentation. Few acts implicate the specter of dishonesty or deceit more than the deliberate and knowing alteration of evidence, which strikes at the heart of the fact-finding process.

In this case, it is undisputed that Respondent and his staff altered the photo line-up provided by the State by removing his own client's photograph and inserting Joseph's. While these altered line-ups were only deposition exhibits, and not trial evidence, they were inherently misleading, and Respondent deployed them in a deceptive attempt to create evidence—an identification of Joseph as the perpetrator. His actions ran afoul of the substantive case law regarding the use of line-ups, were contrary to the purpose of criminal discovery, and most importantly, violated Rules 3-4.3 and 4-8.4(c).

Because the Referee's findings of fact and conclusions of law ignore the competent and substantial evidence of Respondent's guilt, this Court should reject them in their entirety and find Respondent guilty of violating Rules 3-4.3 and 4-8.4(c).

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

A referee's factual findings and recommendations as to guilt carry a "presumption of correctness" and should be upheld "unless clearly erroneous or without support in the record." *The Florida Bar v. Vannier*, 498 So. 2d 896, 898 (Fla 1986). If a referee's findings of fact and conclusions concerning guilt are supported by competent, substantial record evidence, the Court "will not reweigh the evidence and substitute its judgment for that of the referee." *The Florida Bar v. Shoureas*, 913 So. 2d 554, 557 (Fla. 2005).

In this case, however, the Referee's findings of fact and conclusions of guilt are clearly erroneous and lack competent, substantial evidence. Focusing on Respondent's claim that he used the altered line-ups to "effectuate justice," the report concludes that Respondent "acted without any purpose or intention to deceive." (ROR: 4). But, the motive behind an attorney's action is not the determinative factor when analyzing the element of intent. *The Florida Bar v. Brown*, 905 So. 2d 76, 80 (Fla. 2005) (citing *The Florida Bar v. Smith*, 866 So. 2d 41, 46 (Fla. 2004)). To satisfy the element of intent, it must only be shown that the

conduct was "deliberate and knowing." *The Florida Bar v. Frederick*, 731 So. 3d 1249, 1252 (Fla. 1999).

Here, the record demonstrates that Respondent deliberately and knowingly altered the State's line-up, and did so in an attempt to create evidence—an identification of Joseph. Whether Respondent's actions were motivated by pure zealousness or something more sinister matters not. He knowingly created documents which, on their face, suggested Tellisma had made a positive identification of Joseph. He then deliberately used those misleading line-ups during the deposition to ask Tellisma if she could identify the perpetrator. This is precisely the type of dishonesty and deceit Rules 3-4.3 and 4-8.4(c) are designed to protect against.

A. Respondent tried to create evidence by having Tellisma identify the perpetrator from his altered line-ups.

In *State v. Kuntsman*, the Third District explained that criminal discovery is not meant to give defendants the opportunity to build their cases by "creating evidence, i.e., misidentifications." *Kuntsman*, 643 So. 2d 1172, 1174 (internal quotations omitted). Rather, the purpose is "to avail the defense of evidence known to the state" thereby avoiding convictions obtained by the suppression of favorable evidence or "surprise tactics." *Id.* (quoting *Cooper v. State*, 336 So. 2d 1133, 1138 (Fla. 1976)). With that framework in mind, the *Kunstman* opinion quashed the trial

court judge's order forcing the prosecution witnesses to view and respond to questions concerning a defense-created photo array during depositions, absent compelling reasons. *Id.* at 1173-74.

State v. McWilliams clarified this holding, reiterating that allowing defendants to build their cases during discovery by "creating evidence (misidentifications)" is contrary to the purpose of criminal discovery. *McWilliams*, 817 So. 2d 1036, 1037 (internal quotations omitted). But, because the defense in *McWilliams* sought only to use the *actual* police photo line-ups to question the witness about the line-up procedure and identification, and not defense-created line-ups, the purpose was not create evidence. *Id.* The court expressly stated:

> We note that although defense counsel is free to question witnesses about the photographic line-up they viewed, *he is not free to present the witness with the photo line-up and conduct a new identification proceeding.* Accordingly, if the witness is handed the photographic line-up and asked which photograph her or she selected, the witness is free to review the exhibit in its entirety, including the reverse sides of the photographs, to determine which photograph he or she initially selected.

Id. at 1037, n.1 (emphasis added).

Respondent's use of his altered line-ups complied with neither *McWilliams* (which only permits the use of *actual* police lineups) nor *Kuntsman* (which requires a judicial determination of good cause to use *defense-created* line-ups). This is because his intention was not to test Tellisma's prior identification of Woodson—it

was to create a new one. Take, for instance, Respondent's own words when asked to describe the purpose of Tellisma's deposition:

- "[T]o suggest the alternative [suspect] theory from beginning to end." (Tr. III: 345).
- "[T]o see if yet another witness ... would provide even more evidence against Mr. Joseph." (Tr. III: 360).
- "[T]o bring to light the fact that there was an alternative suspect and that [Joseph] was the correct perpetrator ..." (Tr. III: 372).

During the deposition itself, after showing Tellisma an individual picture of Joseph, Respondent asked "whether this guy is the one who robbed you? Because evidently we have a witness who says that this guy confessed to robbing you." (TFB Ex. 1: 36). Over Cabrera's objection, Respondent continued to articulate his defense, discussing Joseph's girlfriend's testimony with Tellisma:

> There's a girl who came in that Ms. Cabrera took a deposition of, so she knows who were [sic] talking about, okay. This girl says that she was with him and he pointed out your house and said he robbed you. Then he got killed a couple of months later.
>
> Unfortunately, he's dead right now, so that's why I ask you, is it possible that this was the boy instead of Woodson who actually robbed you?

(TFB Ex. 1: 37-38).

While the Referee may have credited Barry Wax's testimony that, instead of creating evidence, Respondent was merely "trying to get an identification of an

individual who had been implicated in committing this crime," this is a distinction without a difference. Merriam-Webster defines "evidence" as "something that furnishes proof: testimony; something legally submitted to a tribunal to ascertain the truth of a matter." *Evidence*, Merriam-Webster online dictionary, available at http://www.merriam-webster.com/dictionary/evidence (last visited August 21, 2018). If Tellisma had identified Joseph—the individual Respondent so strongly believed was the actual perpetrator—there can be little doubt that Respondent would have sought to use that identification to prove Woodson's innocence. If that is not the creation of evidence, what is?

B. Respondent's altered line-ups are inherently misleading, and he used them in a deceptive fashion.

More important than Respondent's attempt to create evidence is *how* he tried to do it. One need only compare the line-up provided by the State to Respondent's two altered line-ups to appreciate their inherently misleading nature. Respondent's line-ups are nearly identical to the line-up provided by the State, right down to the Miami-Dade Police Department website address printed on the bottom of the page (indicating the line-up was printed from a police computer). Aside from removing Woodson's photograph and inserting Joseph's (done with enough care to preserve the circle Tellisma had drawn around the photograph), the line-ups appear as nothing more than simple copies.

While the Referee found that Respondent's line-ups were "obviously" cut and pasted, with "lines still visible," this is not so evident—especially to a witness who had absolutely no reason to suspect that Respondent had altered the exhibits (and a witness who Respondent believed had "cognitive deficits.") (Tr. III: 431). More significantly, this finding ignores the fact that the altered line-ups are false: they reflect that Tellisma made an identification of Joseph—an event that never happened. Nonetheless, the line-ups appear on their face as documentary evidence, reflecting that an identification was made on May 11, 2013 by Tellisma, with photograph no. 5 selected and circled, bearing both her signature and the administering detective's.

That the original line-up presented to Tellisma was in color—a fact heavily relied upon by Respondent to support his contention that neither Tellisma or Cabrera were misled—is also of no significance. After Respondent and Cabrera sparred over the appropriateness of her interrupting the deposition to inquire if the original line-up was in color, Respondent asked Tellisma:

> I happened to show you just Exhibit Two. When they were shown to you, was it in black and white or color?

TFB Ex. 1: 27.

This question suggested to Tellisma that she was being shown a copy of what the police had previously shown her. Her answer confirms this understanding:

> When they show *that* to me, I do not remember whether *that* thing was in black and white or color.

TFB Ex. 1: 27 (emphasis added).

In addition, the Referee's finding that Respondent made "proper explanations" and gave "appropriate cautionary instructions" regarding his altered line-ups is unsupported by the record. In her report, the Referee points to following as justification:

- When questioning Tellisma regarding the first altered line-up, Respondent "clearly and specifically" identified it as "*my* Exhibit Number Two," and told Tellisma to "forget about what you did before." (ROR: 10) (emphasis added).
- When presenting Tellisma with the second altered line-up, Respondent asked her to "look at them as if you've never seen them before." (ROR: 13).
- Respondent did not "identify, point to, or use any of [the] existing information" on the altered line-ups when questioning Tellisma. (ROR: 10).

One need only review Tellisma's transcript to see that the evidence does not support these findings. For instance, Respondent only uses the possessive pronoun "my" once to refer to his altered line-ups, and even then it is in the context of asking Tellisma whether the line-up presented to her by the police was "a piece of paper like my Exhibit Number Two over here?" (TFB Ex. 1: 25). Tellisma answered in the affirmative, suggesting further that she understood the document Respondent was displaying to be the same as what the police had shown her.

As for the second altered line-up, the Referee's selective quotation fails to paint the full picture. What Respondent actually asked Tellisma to do was "to look at them as if you've never seen them before, *because I don't know whether you have or not.*" (TFB Ex. 1: 31). This statement is itself a misrepresentation because Respondent clearly knew that Tellisma had never before seen an altered line-up that contained a photograph of Joseph's face with Woodson's hairline.

Third, the mere fact that Respondent did not affirmatively highlight the official markings on his altered-line-ups or expressly bring them to the attention of Tellisma does not prove that she was not misled by them. Just because Respondent did not go so far as to verbally suggest to Tellisma that she had previously identified Joseph as the perpetrator does not mean she was insulated from confusion. Respondent asked her to carefully review the altered line-ups, which would have included viewing all the information contained on the document, even her own handwriting and the circle she drew around photo no. 5.

Finally, even accepting as fact that Respondent informed Cabrera during the off-record conversation that the altered line-ups contained Joseph's image, this acknowledgment does nothing to remedy the misconduct. According to the transcript, this conversation occurred after Respondent had already questioned Tellisma regarding Exhibit Two, and after Exhibit Three had been introduced. (TFB

Ex. 1: 29). Respondent's alerting Cabrera to his alternations of the line-ups—after he questioned the witness with the first one and introduced the second—falls far short of the "open and transparent" use attributed to him by the Referee.

C. This Court's case law supports a finding of guilt as to Rules 3-4.3 and 4-8.4(c) based upon the record evidence.

Though eyewitness identifications are problematic, neither criminal defense attorneys nor prosecutors may manipulate the evidence to their advantage.

In *State v. Herrera*, 866 So. 2d 151 (Fla. 4th DCA), charges were dismissed against a defendant after it was revealed the prosecutor had intentionally altered the identification evidence. The prosecutor provided witnesses with a photograph of the defendant which helped them identify the individual pictured as the perpetrator—something the witnesses could not previously do. *Id.* at 152. Finding that the prosecutor destroyed evidence favorable to the defendant, i.e., the inability of the witnesses to make an identification, the court concluded that the violation of due process warranted the ultimate sanction of dismissal. *Id.*

In the Matter of Gross, 759 N.E. 2d 288 (Mass. 2001), the Massachusetts Supreme Court suspended a criminal defense attorney who attempted to confuse a victim's identification of the defendant by having an alibi witness impersonate the defendant. When the case was called for trial, the attorney had the alibi witness approach as if she were the defendant and sign a form acknowledging a continuance,

all in an attempt to prompt a subsequent misidentification by the victim at trial. *Id.* at 289. Finding the attorneys' conduct "a form of misrepresentation amounting to criminal contempt and obstruction of justice," the Massachusetts Supreme Court suspended the attorney for 18 months. *Id.* at 293.

Basic fundamental dishonesty "is a serious flaw, which cannot be tolerated." *The Florida Bar v. Rotstein*, 835, So. 2d 241, 246 (Fla. 2002). This is because dishonest conduct "demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole." *The Florida Bar v. Head*, 27 So. 3d 1, 8-9 (Fla. 2010). Misrepresentation and dishonesty, especially concerning legal documents, warrants severe discipline. *See The Florida Bar v. Hall*, 49 So. 3d 1254 (Fla. 2010) (attorney disbarred for engaging in fraudulent conduct in her personal affairs by recording a forged document in the county clerk's office); *The Florida Bar v. Cramer*, 678 So. 2d 1278 (Fla. 1996) (attorney disbarred for forging another person's signature on forms to lease computer and office equipment); *The Florida Bar v. Segal*, 663 So. 2d 618 (Fla. 1995) (attorney suspended for making a false statement in a petition for discharge submitted to probate court).

Much like the forgery of a document, the surreptitious alteration of exhibits in a discovery deposition calls into question the integrity of the judicial process. Indeed, "[i]f lawyers and the public cannot rely on the authenticity of legal papers,

the very foundation of our legal system becomes fractured and unsustainable." *The Florida Bar v. Ross*, 140 So. 3d 518, 522 (Fla. 2014).

As shown above, the record evidence fails to support the Referee's finding that the altered line-ups Respondent created were not misleading, or that his use of them was open and transparent. Consequently, the report's attempt to distinguish the application of this Court's precedent concerning misrepresentation in the discovery process is also erroneous.

This Court has routinely sanctioned attorneys for misrepresentation, deceptiveness, and dishonesty in the discovery process:

- *The Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002): Lawyer suspended for concealing an exhibit during a deposition and stating "I'm not seeing it" when opposing counsel asked if the lawyer knew its location. This statement "was intended to mislead because she in fact knew where the document was located and failed to disclose that information." *Id.* at 483.

- *The Florida Bar v. Miller*, 863 So. 2d 231 (Fla. 2003): Lawyer suspended for aiding his client's false deposition testimony regarding whether she had received an Equal Employment Opportunity Commission's notice of her right to sue.

- *The Florida Bar v. Nicnick*, 963 So. 2d 219 (Fla. 2007): Lawyer suspended for knowingly concealing a settlement agreement from opposing counsel and instead delivering it directly to the opposing party.

- *The Florida Bar v. Head*, 84 So. 3d 292 (Fla. 2012): Lawyer suspended for, among other things, creating a letter during a dispute between and landlord and tenant which falsely reflected that a lawsuit had been filed.

The attorney's "deliberate and knowing act of providing a fraudulent letter with an unrelated case number, in order to obtain a tactical advantage for his client, demonstrates that he acted intentionally." *Id.* at 300.

- *The Florida Bar v. Whitney*, 132 So. 3d 1095 (Fla. 2013): Attorney suspended for producing a redacted document during a deposition (and failing to disclose the redaction), when there was no privilege allowing for it.

- *The Florida Bar v. Dupee*, 160 So. 3d 838 (Fla. 2015): Lawyer suspended for knowingly filing an inaccurate financial statement, deliberately withholding financial documents during discovery, and knowingly allowing client to present false deposition testimony.

Although the facts of these cases differ, one thing remains the same: this Court's intolerance for attorneys who engage in deception, dishonesty or misrepresentation during the discovery process in an effort to gain a tactical advantage.

Here, it is undisputed that Respondent and his staff knowingly created the altered line-ups, which misleadingly suggested that Tellisma had previously identified Joseph as the perpetrator. It is similarly undisputed that Respondent deliberately used the line-ups to ask Tellisma whether she could identify the perpetrator. Although the report claims that Respondent's actions were merely a good faith, honest attempt to test the witness's identification of the defendant as the perpetrator (ROR: 5), that conclusion is belied the overwhelming weight of the evidence. Respondent sought to achieve a tactical advantage for his client, namely,

the identification of Joseph as the actual perpetrator. In his attempt to create that evidence, Respondent engaged in dishonesty and deceptiveness, the hallmarks of a violation of Rules 3-4.3 and 4-8.4(c). Accordingly, this Court should reject the Referee's recommendations as to guilt and find Respondent guilty of violating Rules 3-4.3 and 4-8.4(c).

CONCLUSION

Because the undisputed evidence establishes that Respondent knowingly and deliberately created altered photo line-ups, which misleadingly suggested that Tellisma had identified Joseph as the perpetrator, The Florida Bar respectfully requests that this Court reject the Referee's findings of fact and recommendation that Respondent be found not guilty of violating Rules 3-4.3 and 4-8.4(c).

The best evidence in this case—Tellisma's deposition transcript—unequivocally establishes that Respondent deliberately used these misleading line-ups to ask Tellisma if she could identify the perpetrator—a tactical maneuver designed to benefit his client. No amount of inconsistency between Cabrera's testimony and that of Respondent and his witnesses can diminish the significance of these facts.

Accordingly, the Bar respectfully requests that this Court find Respondent guilty of violating Rules 3-4.3 and 4-8.4(c).

Thomas Allen Kroeger, Bar Counsel

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, using the E-Filing Portal; and that a copy has been furnished using the E-Filing Portal to Benedict P. Kuehne, Attorney for Respondent, via email to ben.kuehne@kuehnelaw.com and efiling@kuehnelaw.com; and to Adria E. Quintela, Staff Counsel, The Florida Bar, via email at aquintel@floridabar.org on this 22 day of August, 2018.

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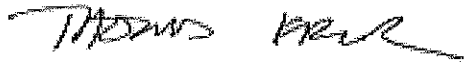
CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.



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