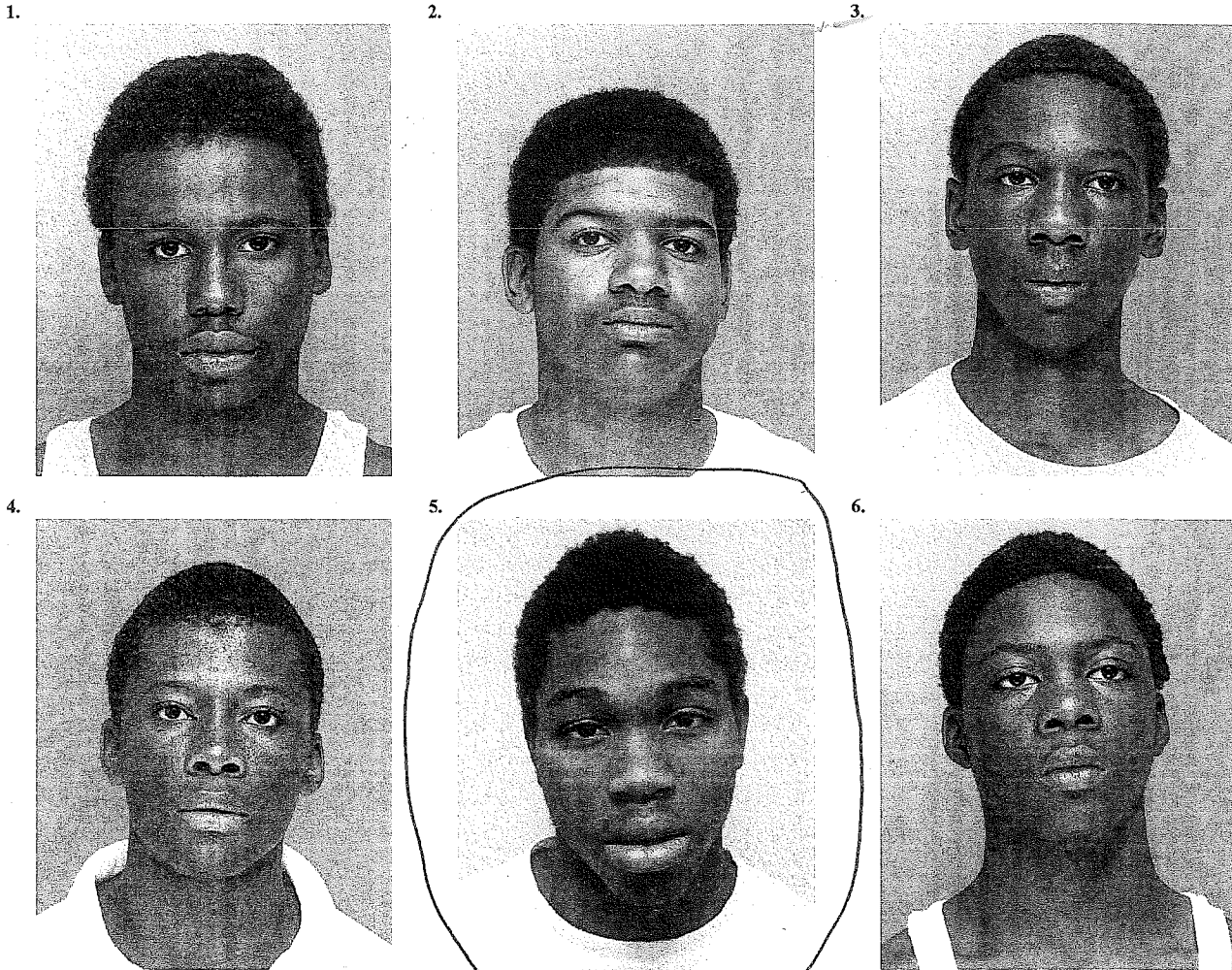


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APPENDIX

Photographic Line-Up



SHOWING PHOTO DISPLAY:

Before conducting the photo line-up, the following should be read to each witness

"In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hair styles, beards, and moustaches may be easily changed. Also, photographs may not always depict the true complexion of a person -- it may be lighter or darker than shown in the photo. Pay no attention to any markings or numbers that may appear on the photos or any other differences in the type or style of the photographs. When you have looked at all the photos, tell me whether you see the person who committed the crime. Do not tell other witnesses that you have or have not identified anyone."

Identification made : YES NO
Date of Identification : 5/11/13

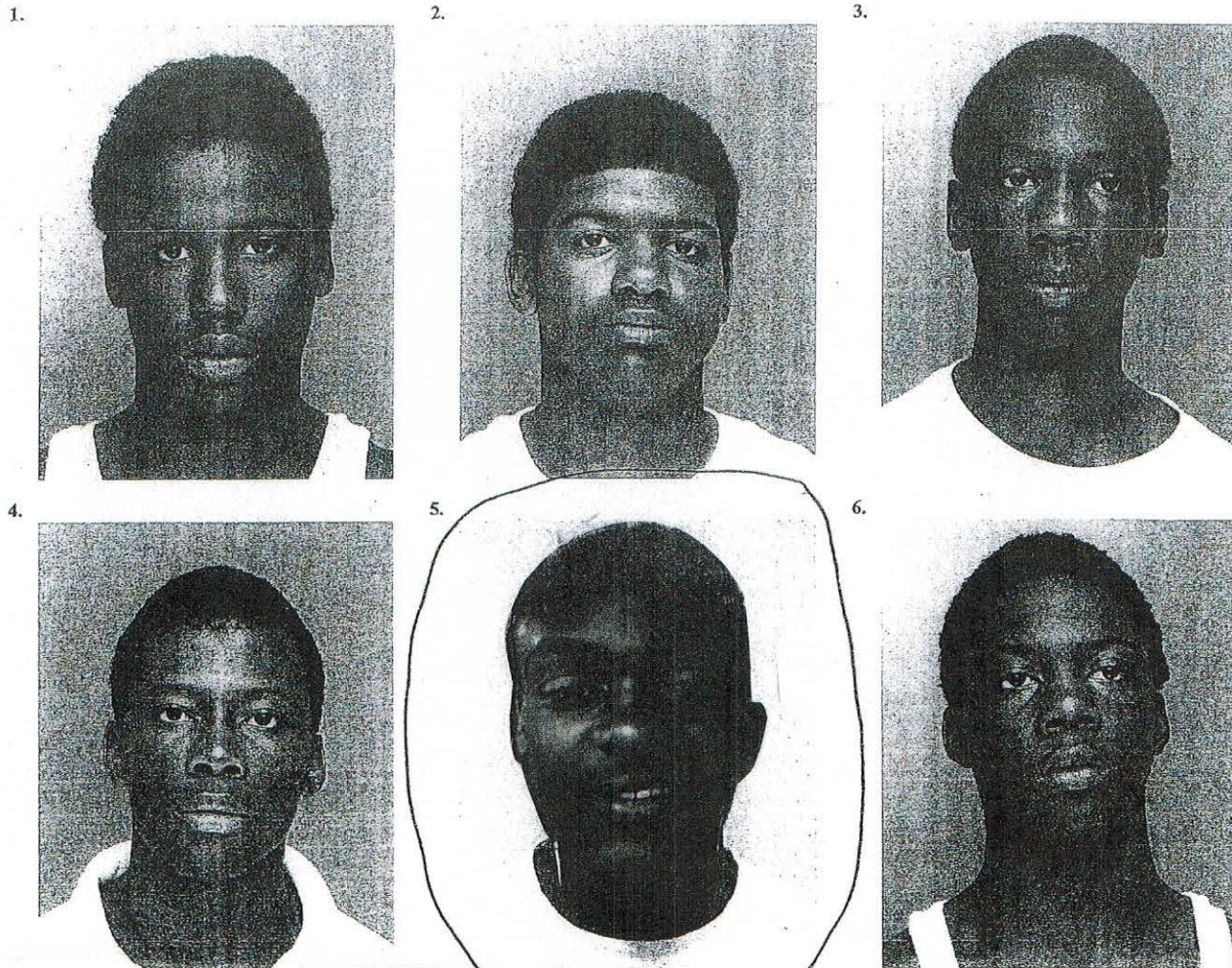
Photo selected : # 5
Initialed by the witness : *[Handwritten signature]*

DET. F. GUARDIA
[Handwritten signature]

Appendix 1

E+2

Photographic Line-Up



SHOWING PHOTO DISPLAY:

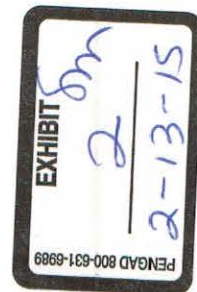
Before conducting the photo line-up, the following should be read to each witness

"In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hair styles, beards, and moustaches may be easily changed. Also, photographs may not always depict the true complexion of a person -- it may be lighter or darker than shown in the photo. Pay no attention to any markings or numbers that may appear on the photos or any other differences in the type or style of the photographs. When you have looked at all the photos, tell me whether you see the person who committed the crime. Do not tell other witnesses that you have or have not identified anyone."

Identification made : YES NO
 Date of Identification : 5/11/13

Photo selected : # 5
 Initialed by the witness : *[Signature]*

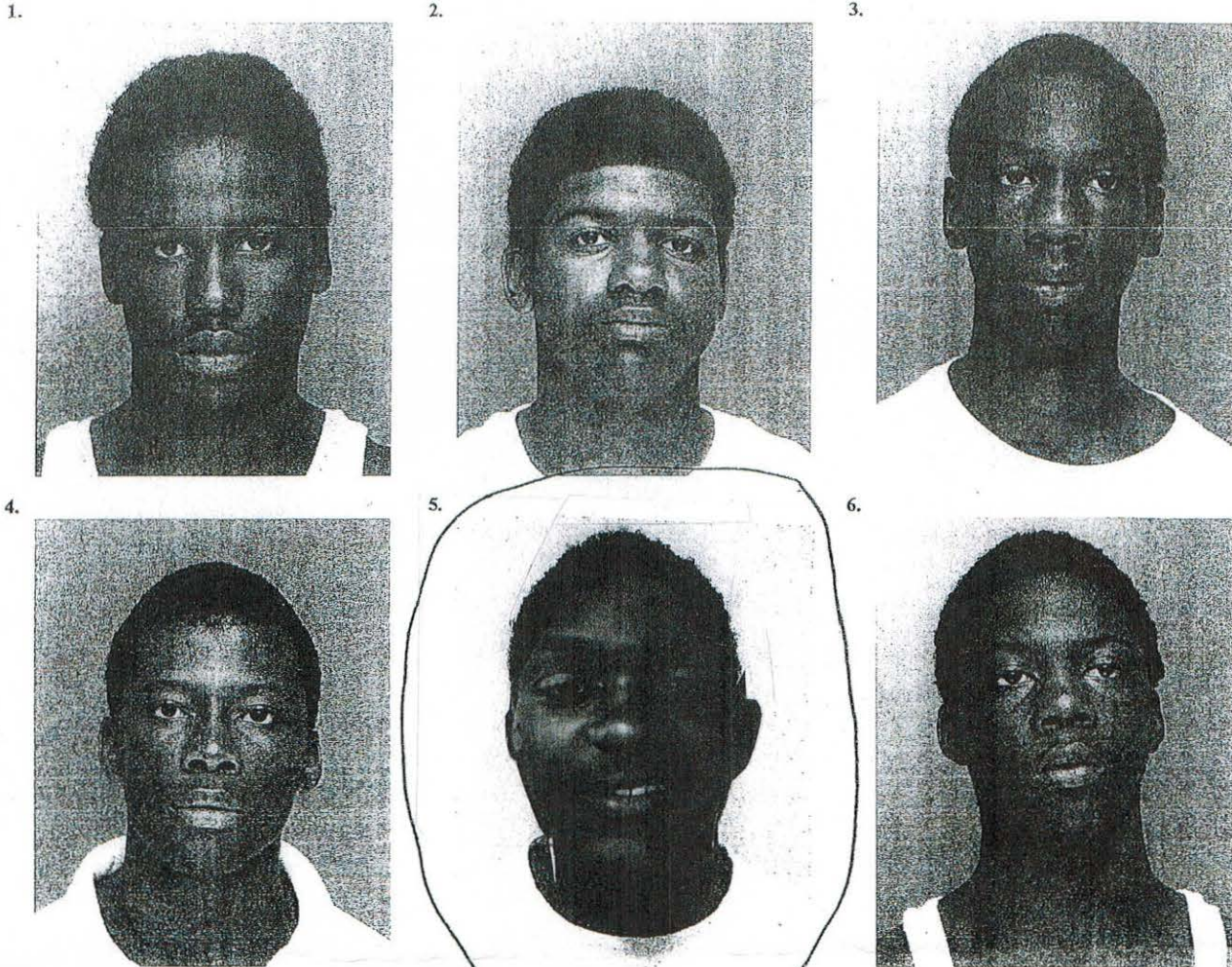
Det. F. Guada
[Signature]



Appendix 2

Ex 3

Photographic Line-Up



SHOWING PHOTO DISPLAY:

Before conducting the photo line-up, the following should be read to each witness

"In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hair styles, beards, and moustaches may be easily changed. Also, photographs may not always depict the true complexion of a person -- it may be lighter or darker than shown in the photo. Pay no attention to any markings or numbers that may appear on the photos or any other differences in the type or style of the photographs. When you have looked at all the photos, tell me whether you see the person who committed the crime. Do not tell other witnesses that you have or have not identified anyone."

Identification made : YES NO
 Date of Identification : 5/11/13

Photo selected : # 5
 Initialed by the witness : *[Signature]*

Det. F. GUARDARUCCI
[Signature]

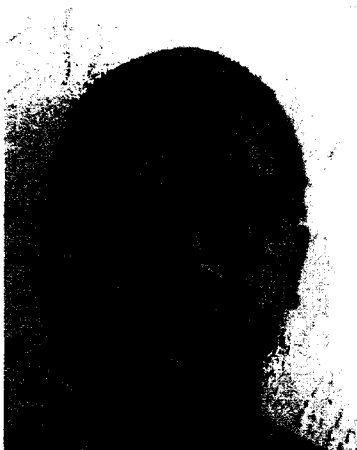


Appendix 3

Photographic Line-Up

Ex 4

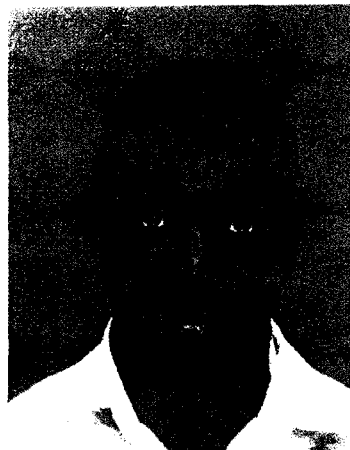
1.



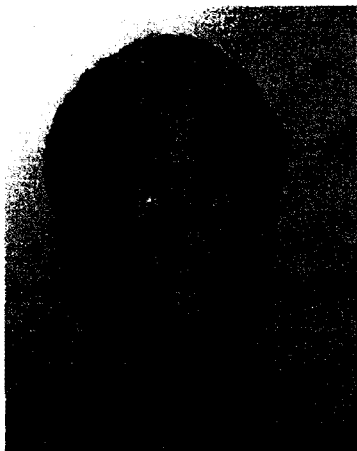
2.



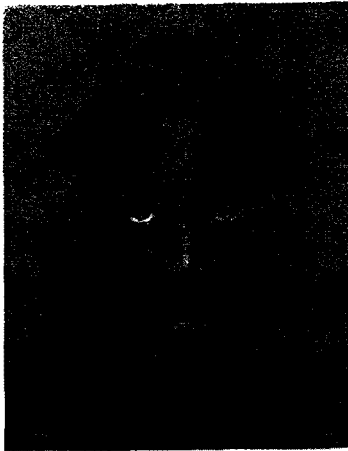
3.



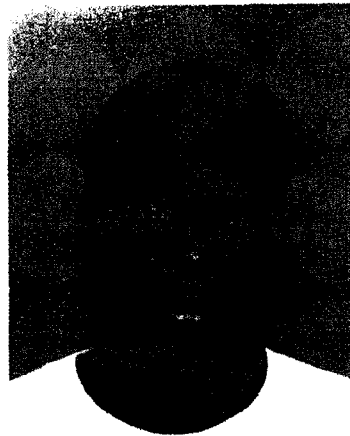
4.



5.



6.



SHOWING PHOTO DISPLAY:

Before conducting the photo line-up, the following should be read to each witness

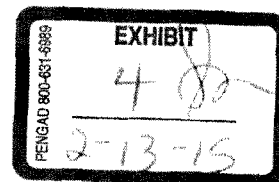
"In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hair styles, beards, and moustaches may be easily changed. Also, photographs may not always depict the true complexion of a person -- it may be lighter or darker than shown in the photo. Pay no attention to any markings or numbers that may appear on the photos or any other differences in the type or style of the photographs. When you have looked at all the photos, tell me whether you see the person who committed the crime. Do not tell other witnesses that you have or have not identified anyone."

Identification made : YES NO

Photo selected : # _____

Date of Identification : _____

Initialed by the witness : _____



check

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR MIAMI-DADE COUNTY

STATE OF FLORIDA,

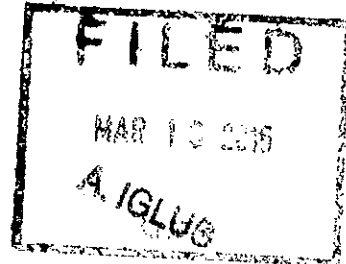
Case No. F13-12946

Judge BLOCH

Plaintiff,

vs.

VIRGIL WOODSON,
Defendant.



MOTION FOR SANCTIONS

COMES NOW KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney, and files this Motion for Sanctions, pursuant to Fla. R. Crim. P. 3.220, the Florida Bar Rules of Professional Conduct, and the Eleventh Judicial Circuit Standards of Professionalism and Civility, in the above-styled matter, and in support thereof, shows the following:

I. Introduction

The State is filing this Motion for Sanctions against Defense Attorney Jonathan Stephen Schwartz (hereinafter "Mr. Schwartz") (Florida Bar Number 579361) because Mr. Schwartz violated his ethical obligations to the Court, opposing counsel, and his client, the Defendant, on February 13, 2015, during the Continuation of the Deposition of Gersie Tellisma (hereinafter the "Victim") in two ways. First, Mr. Schwartz tampered and/or altered the State's evidence and through the use of the tampered evidence, misrepresented and attempted to trick the Victim into misidentifying the perpetrator who robbed her. Second, Mr. Schwartz interfered with Creole Interpreter Don Corasmin's (hereinafter the "Interpreter") ability to properly translate during the deposition, affecting the accurate transcription of the testimony taken on that day.

CD Johnson
MAR 25 2015

The State is requesting that the Court impose the following sanctions: (1) strike the Transcript of Continuation of the Deposition of Gersie Tellisma dated February 13, 2015, (2) prohibit Mr. Schwartz from re-deposing the Victim, (3) in the interest of justice, disqualify Mr. Schwartz as the attorney representing the Defendant, (4) refer the matter to the Florida Bar for disciplinary review, and (5) impose any other sanctions against Mr. Schwartz as the Court deems appropriate.

II. Procedural Background

On May 9, 2013, the Juvenile Defendant was arrested for one count of Armed Robbery with a Deadly Weapon. The State filed a Juvenile Direct File Information, charging the Defendant as an adult, for one count of Robbery Using a Deadly Weapon or Firearm and one count of Carrying a Concealed Firearm. An Amended Information was filed on November 18, 2014 adding a charge of Tampering with an Electronic Monitoring Device for events that took place on September 26, 2014.

Based on the charges in this case, the Defendant is facing a sentence ranging from 52.875 months state prison up to life, with a 10 year minimum-mandatory sentence.¹

The Defendant is currently represented by Mr. Schwartz. The undersigned was officially assigned as the prosecutor on the case on December 8, 2014.

III. Summary of the Facts

The deposition of the Victim began on February 25, 2014, but it was suspended because the Victim did not feel well. Subsequently, there were several attempts made between the State

¹ The Defendant has a second open case, F15-1918, in which he is charged with one count of Battery by a Detainee on Other Detainee, which is a 3rd degree felony punishable up to five years state prison. If his second case is included in the punishment guidelines calculation, the bottom of the Defendant's punishment guidelines increases to 55.575 months state prison. His maximum exposure remains the same.

and Defense to coordinate the continuation of the Victim's deposition, but it was not accomplished until the undersigned was assigned to the case.

The undersigned coordinated the continuation of the Victim's deposition to take place on Friday, February 13, 2015, with Mr. Schwartz, his associate, Ms. Jody Baker (hereinafter "Ms. Baker"), and the Victim. The State arranged for transportation for the Victim and requested that Mr. Schwartz provide a Creole interpreter for the deposition as the Victim told the undersigned that she is not fluent in English and can better express herself in her native language of Creole.

On the day of the deposition, all of the parties arrived in a timely fashion. The deposition took place in the undersigned's office. The parties that were present during the deposition are as follows: the Victim, Court Reporter Susan Mahmoud (hereinafter the "Court Reporter"), the Interpreter, Mr. Schwartz, Ms. Baker, an intern at the State Attorney Office, Cindy Ferreiro, and the undersigned.

Before the start of the deposition, the undersigned explained to the Victim and the Interpreter the procedure of questions and answers with the use of a translator; i.e., Mr. Schwartz asks the question in English, the Interpreter translates Mr. Schwartz's question in Creole for the Victim, the Victim then answers Mr. Schwartz's question in Creole, and the Interpreter translates the Victim's answer into English. This order of questioning and answering was intended to facilitate the accurate transcription of what was being said during the deposition.

The deposition started smoothly but started to get "messy," when Mr. Schwartz began asking the Victim to identify the person who told her she was going to get her car key back. *See* Tellisma Dep. 8:11-25, attached and hereinafter referred as Exhibit A. When the Victim answered that "[t]he Woodson family said they were going to send the key back," Mr. Schwartz's demeanor completely change from neutral to visibly upset. *Id.* at 8: 24-25. (Insert added.) The

Victim explained that before she received the package containing her car key, she was approached by the Defendant's aunt at the parking lot of the Victim's apartment complex. *Id.* at 9. The Defendant's aunt was on the phone with the Defendant's mother, who was apologizing for the Defendant's actions and was telling the Defendant's aunt to tell the Victim that she had found the Victim's car key in her house (where the Defendant resides) and wanted to return it to the Victim. *Id.* at 9-12; 13:1-6.

While Mr. Schwartz was questioning the Victim about the parking lot incident, Mr. Schwartz rushed through his questions, which prohibited the Interpreter from fully translating Mr. Schwartz's questions into Creole and the Victim's answers into English. There were times where even Mr. Schwartz would interrupt the Victim as she was answering in Creole which would cause the Interpreter to stop listening to the Victim and to stop translating anything that the Victim was saying into English. This all was happening so quickly that the undersigned believes the transcription is not a complete and accurate reflection of the Victim's testimony. As an attempt to not interrupt the transcription process, the undersigned was using hand signals to remind Mr. Schwartz to (a) allow the Victim to finish answering the questions in Creole, (b) allow the Interpreter to listen to what the Victim was saying in Creole, and (c) allow the Interpreter to translate exactly what the Victim was saying in Creole into English. Mr. Schwartz however ignored the undersigned's hand signals and left the undersigned with no choice but to interject and state on the record, "[l]et [the Victim] finish" her answer. *See Exhibit A at 13:8-10.* (Inserts added.)

As this rapid-firing of questions continued, Mr. Schwartz's demeanor appeared increasingly agitated. He continued to ask the Victim question after question, this time with sarcastic overtones. Mr. Schwartz continued to interfere with the Interpreter's ability to fully

translate Mr. Schwartz's questions into Creole so that the Victim could understand the questions being asked and would interfere with the Interpreter's ability to fully translate the Victim's answers into English. Even the Interpreter appeared confused throughout the deposition as there were so many questions being asked at the same time. It was apparent to the undersigned that the Interpreter literally could not keep up with Mr. Schwartz speed in his questioning. Mr. Schwartz displayed his impatience through his facial expressions and was speaking to the Victim in a demeaning manner, such as when he was questioning her about the description of her keys.² Mr. Schwartz told the Victim sarcastically, "Listen to my question real closely. What did your keys look like? Right, like my keys; one big one, another key, lots of other keys here, lots of discount cards." See Exhibit A at 14:9-13. It is the opinion of the undersigned that the root of the Victim's unresponsiveness stemmed from the fact that she was not receiving the full Creole translation from the Interpreter of what was being said in English, and the reason she was not receiving the Creole translation from the Interpreter was because the Interpreter could not keep up with Mr. Schwartz's speed in questioning. See *id.* at 13:13-25; 14-16; 17:1-13.

The undersigned had to continuously remind Mr. Schwartz throughout the deposition that he needed to allow the Interpreter to translate everything being said. The undersigned repeatedly requested to go off the record to address that constant issue. See Exhibit A at 17:13-21; 18:11-13; 19:line 3-4; 21:3-7, 18.

The undersigned observed moments where the Interpreter, because of Mr. Schwartz's antagonistic behavior and resulting tension that overwhelmed the room, failed to translate

² During one of the off-the-record discussions, the Victim, who was visibly upset, told the undersigned she felt that Mr. Schwartz was verbally attacking, pressuring, and confusing her. The undersigned explained to the Victim again to just listen to what the Interpreter is saying to her in Creole and to answer only in Creole (and not in broken English). The undersigned also told the Victim to do her best to ignore Mr. Schwartz's intimidation tactics.

everything that was being said by the Victim in Creole into English and/or translate everything that Mr. Schwartz was saying in English into Creole for the Victim. Even Mr. Schwartz on the record acknowledged that the translation was not being done properly by stating, "No, no, no. I need you to translate for me." *See* Exhibit A at 34:11-12. Many times the undersigned observed the Victim say several words and sentences in Creole (which the undersigned does not speak or understand Creole) and then the Interpreter was either non-responsive or just interpreted what the Victim said in literally one word which could not have reasonably been the Victim's complete answer. *See example* in Exhibit A, 19:3-4. Because of this, even the Court Reporter also asked the Interpreter and the Victim at one point, "I'm sorry. Did you answer?" *Id.* at 35:11-12.

To make things worse, Mr. Schwartz then proceeded to question the victim about her photo line-up identification. *See* Exhibit A at 25-39. The State is in possession of black-and-white copies of the photo line-ups and previously provided copies of the photo line-ups to Mr. Schwartz in the initial discovery packet during the June 10, 2013 Arraignment hearing.

Mr. Schwartz proceeded to ask the Victim what document was physically provided to her when she was shown the line-up and began to mark something that appeared, at a distance, to be the line-up provided by the State as Exhibit 2.³ *See* Exhibit A, 25:8-18. The undersigned noticed that the Victim look confused when Mr. Schwartz began questioning her about the line-up, so the undersigned wanted to make sure the Victim understood what Mr. Schwartz was talking about, by asking her if she remembered meeting with the Detective in person after the incident whereby the Detective was going to ask if she could recognize the person who robbed her and if the Detective showed her a line-up in black and-white or in color. *Id.* at 25:22-25; 26:1-8. Because

³ The undersigned was seated at her desk which was across from the Victim, Mr. Schwartz, the Court Reporter, and the Interpreter. The undersigned was facing the Victim and Mr. Schwartz and was approximately 10 feet away from Mr. Schwartz.

the Victim is not fluent in English, the undersigned was, in the interest of justice, attempting to ensure that the Victim was properly oriented to what Mr. Schwartz was questioning her about. Mr. Schwartz proceeded to make an outburst about how the undersigned could not “keep interrupting [his] depo” and that the undersigned would have to wait to clarify anything during “cross examination.”⁴ *See* Exhibit A at 26: 4-25; 27:1-4. (Insert added.)

Mr. Schwartz then continued to ask the Victim about her photographic line-up identification. *See* Exhibit A, 27:18-25; 28. Mr Schwartz showed the Victim Exhibit 2, without previously showing the exhibit to the undersigned to allow for the undersigned to review it and state any objection on the record. At first, the undersigned believed that Exhibit 2 was one of the line-ups that were previously provided in discovery, but then the undersigned noticed, from a distance, that Photograph 5 appeared different from what was provided by the State in discovery. *Compare* State’s photographic lineup attached as Exhibit B, to “Exhibit 2” attached in Exhibit A. The undersigned then immediately told Mr. Schwartz to “let [the undersigned] see [the exhibit].” *See* Exhibit A at 28:23. (Inserts added.) Mr. Schwartz ignored the undersigned’s request and continued to question the Victim and began to try to show the Victim another exhibit, Exhibit 3. Mr. Schwartz was being difficult and did not hand over Exhibit 2 to the undersigned. The undersigned was forced to take Exhibit 2 out of Mr. Schwartz’s hand so she could review it, stating to Mr. Schwartz, “Can you please show it to me before you show [the Victim]?” *Id.* at 29:13-14. (Insert added.)

⁴ Customarily, the undersigned would wait until cross-examination to ask clarifying questions, but the special circumstances justified the need for interjection.

The undersigned then asked to go off the record so that the undersigned could review Exhibits 2 and 3 and discuss with Mr. Schwartz where he obtained those exhibits.⁵ *Id.* at 29:17-19. The undersigned compared Exhibit 2 to the photographic line-up provided by the State in discovery and realized that Mr. Schwartz tampered with the State's evidence by removing the Defendant's photograph and replacing it with a photograph of another individual. In the photographic line-up done with the detective prior to the Defendant's arrest, the Victim had circled Photograph 5, which is the Defendant's photograph, and then signed the lineup. On that same line-up, Detective Guadarrama checked off that an identification was made, that Photograph 5 was selected, dated the line-up by writing "5/11/13," wrote out his name in print, and then signed his name in cursive. Mr. Schwartz's exhibit, Exhibit 2, appeared identical to the police's photo line-up except the Defendant's photograph (which was Photograph 5) had been removed and replaced with a photograph of another individual. Mr. Schwartz essentially tampered with the State's evidence and was intentionally misleading the Victim into believing that Exhibit 2 was the photographic line-up that she was presented with by the Detective.⁶

Mr. Schwartz intentionally misrepresented and willfully attempted to trick the Victim into misidentifying the perpetrator by using Exhibits 2 and 3. At first glance, Exhibit 2 and Exhibit 3 appear to be the same but when one looks closer at Photograph 5, one can tell that Mr. Schwartz

⁵ During the off-the-record discussion, Mr. Schwartz told the undersigned that he did not need to explain to the undersigned how he obtained Exhibits 2 and 3.

⁶ To shed some more light into Mr. Schwartz's motive to tamper with the State's photographic lineups, Mr. Schwartz's theory of defense is misidentification. Mr. Schwartz is trying to establish, albeit unethically and improperly, that another individual by the name of Fritz Len Joseph, who is now deceased, was the person who robbed the Victim- not the Defendant. He is trying to frame his theory using (1) defense witnesses (which the State does not find credible), (2) a mysterious letter that was with the Victim's car keys in a package received by the Victim and the letter was poorly written in Creole stating essentially that "Fritz did it" (the letter cannot be authenticated and could have very well been written by anyone including the Defendant and/or his family members - some of which are listed as defense witnesses), and (3) Victim deposition testimony as impeachment by having the Victim identify "Fritz" as the robber through Mr. Schwartz's exhibits (note- Photograph 5 of Exhibits 2 and 3 are photographs of Fritz Len Joseph).

changed the hair style of the person. The individual in Photograph 5 of Exhibits 3 has the same or similar hair style of that of the Defendant. Compare State's photographic lineup attached as Exhibit B to "Exhibit 2" and "Exhibit 3" attached in Exhibit A.

The undersigned objected to Mr. Schwartz using Exhibits 2 and 3 because they were misleading. See Exhibit A at 30:7-22. In addition, the undersigned stated that "[she] will be bringing this in front of the court." *Id.* at 30:21-22. Ignoring the objection, Mr. Schwartz proceeded to ask the Victim questions regarding Exhibit 3. *Id.* at 30:23-25; 31:1-4. The undersigned objected again and stopped the deposition. *Id.* at 31; 32:1-4.

During the recess, the undersigned considered suspending the deposition all together but was put in a difficult situation because the undersigned wanted to accommodate the Victim's request to finish her deposition.⁷ The undersigned decided to go back on the record and reiterate her objection to Mr. Schwartz's attempts to have the Victim make identifications during her deposition and create evidence. *Id.* at 32:5-18. The undersigned asked Mr. Schwartz to "refrain from [that] line of questioning and continue on[to] something else." *Id.* at 32:15-16. (Inserts added.) Mr. Schwartz disregarded the undersigned and continued to ask the Victim to make identifications during her deposition using Exhibits 4, 5, 6, and 7. *Id.* at 32:19-25, through 37. The undersigned continued to object and took issue with Mr. Schwartz continuing to show exhibits to the Victim without first showing it to the undersigned. *Id.*

Mr. Schwartz was doing everything he could to fire away questions without allowing the Interpreter to properly translate everything being said because he knew the Victim somewhat

⁷ The Victim had previously told the undersigned that this would be her third time coming to the State Attorney's Office for her deposition. According to the Victim, she appeared once for deposition but it had to be suspended because she was ill. The next time she appeared, Mr. Schwartz failed to appear to the deposition. The third time, the deposition was canceled because Mr. Schwartz failed to reserve a Creole Interpreter. The Victim had told the undersigned that she could not keep missing work.

understood English and was intentionally trying to create doubt on the Victim's mind as to who actually robbed her by saying, among other things, "Well, I'm asking you really is whether this guy [Fritz Len Joseph] is the one who robbed you? Because evidently we have a witness who says that this guy [Fritz Len Joseph] confessed to robbing you." *Id.* at 36:20-23. (Inserts added.)

Mr. Schwartz continued on to editorializing his defense theory to the Victim by stating,

"There's a girl who came in that Ms. Cabrera took a deposition of...[t]his girl says that she was with him [Fritz Len Joseph] and he pointed out your house and said that 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 [Fritz Len Joseph] instead of Woodson who actually robbed you?"

Id. at 37:23-25; 38:1-6. (Inserts added.) Mr. Schwartz said this so fast and the undersigned was shocked to hear what Mr. Schwartz was saying that the undersigned finally stated on the record her objection and then Mr. Schwartz responded to the objection stating he will "withdraw the question." *Id.* at 38:12. Mr. Schwartz knew exactly what he was doing. His actions were underhanded and unethical.

Mr. Schwartz did not permit cross-examination. After his rapid-fire line of questions, Mr. Schwartz stated he had no additional questions and immediately walked out of the room. Out of respect for opposing counsel and the undersigned's ethical obligations to have the Defendant's counsel present during cross-examination, the undersigned did not conduct the cross-examination of the Victim. *Id.* at 38:14-21.

IV. Summary of the Law and Analysis

Mr. Schwartz's actions violated the rules of procedure, ethics, and the law.

A. Fla. R. Crim. Pro. 3.220(h): Discovery Depositions

Fla. R. Crim. Pro. 3.220(h)(1) states, "Except as provided herein, the procedure for taking the deposition, including the scope of the examination, and the issuance of a subpoena (except a subpoena duces tecum) for deposition by an attorney of record in the action, shall be the same as that provided in the Florida Rules of Civil Procedure."

Fla. R. Crim. Pro. 3.220(h)(2) provides:

At any time during the taking of a deposition, on motion of a party or of the deponent, and upon a showing that the examination is being conducted in *bad faith* or in such manner as to *unreasonably annoy, embarrass, or oppress the deponent or party*, the court in which the action is pending or the circuit court where the deposition is being taken may (1) *terminate the deposition*,... (6) *impose any sanction authorized by this rule*... Upon demand of any party or deponent, the taking of the deposition shall be suspended for the time necessarily to make a motion for any order."

(Emphasis added.)

The State's position is that Mr. Schwartz conducted the deposition in bad faith and in such manner as to unreasonably annoy, embarrass, or oppress the Victim, the Interpreter, and the undersigned. Mr. Schwartz not only interfered with the Interpreter's ability to accurately and completely translate what was being said in the deposition, he did so intentionally to confuse the Victim and "trick" her into saying that the Defendant was not the person who robbed her. Mr. Schwartz also repeatedly asked the Victim to make identifications in the deposition and was trying to create evidence by intentionally tampering with and altering the evidence in the case to mislead the Victim into identifying another person (Fritz Len Joseph) as the robber, and not the Defendant. Mr. Schwartz also would disregard the undersigned's requests such as to slow down his questioning, to stop interrupting the Victim and Interpreter, and to show the undersigned exhibits he intended to use during questioning *before* showing it to the Victim. Mr. Schwartz also disregarded the undersigned's objections to identifications during deposition.

B. Eleventh Judicial Circuit Standards of Professionalism and Civility

The Eleventh Judicial Circuit adopted and incorporated the Florida Bar Ideals and Goals of Professionalism. See "Exhibit A" in In Re: Eleventh Judicial Circuit Professionalism and Civility Committee and Local Professionalism Panel, Administrative Order No. 14-01 A1, attached as Exhibit C.

Florida Bar Ideal #3 (Honesty and Candor) states the following: "A lawyer's word should be his or her bond. The lawyer should *not knowingly misstate, distort, or improperly exaggerate any fact or opinion* and should not improperly permit the lawyer's silence or inaction to mislead anyone." (Emphasis added.) See "Exhibit A" of Exhibit C; *see also* paragraph 1 of IV. Candor to the Court/Tribunal and Opposing Counsel of the "Standards of Professional Courtesy and Civility for South Florida" contained on page 12 of Exhibit C.

Mr. Schwartz misstated and distorted the evidence on the case by removing the Defendant's photograph in the line-up and replacing it with another person's photograph (Fritz Len Joseph), while never stating to the Victim or to the undersigned how he changed the State's evidence and Mr. Schwartz tried to mislead the Victim into believing she had identified this other person by keeping her signature and the Detective's signature on the tampered line-up. Mr. Schwartz also improperly exaggerated his own opinion about the case by expounding on his defense theory to the Victim by telling her some other defense witness said someone else robbed the Victim. That is inappropriate and a deposition is not a forum for an attorney to editorialize his or her opinion about the case.

Florida Bar Ideal #5 (Courtesy) provides that "A lawyer should treat all persons with courtesy and respect and at all times *abstain from rude, disruptive and disrespectful behavior...*" (Emphasis added.)

Mr. Schwartz violated this ideal by acting in a rude, sarcastic, and demeaning manner to the Victim throughout the deposition when the Victim did not understand what Mr. Schwartz was asking her (because he would continuously interrupt the Interpreter) and when the Victim answered in a way as to incriminate the defendant (i.e. when she testified about the Defendant's family approaching her in the parking lot, apologizing on the Defendant's behalf, and letting her know they found her key). Mr. Schwartz would show through his facial expressions and the tone of his voice that he was disapproving of what the Victim was testifying.

C. Florida Bar Rules of Professional Conduct

Florida Bar Rule 3-4.2 states that any "[v]iolation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline."

Florida Bar Rule 3-4.3 provides that a "commission by a lawyer of any act that is unlawful or *contrary to honesty and justice*...may constitute a cause for discipline." (Emphasis added.)

Florida Bar Rule 4.8.4(b) prohibits a lawyer from "commit[ting] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." (Insert added.)

Mr. Schwartz's actions in the deposition show his dishonesty and willingness to go so far as to tamper with the evidence and to mislead the Victim into testifying that someone else did the robbery.

Florida Bar Rule 4.8.4(c) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." In order to sustain a violation of rule 4-8.4(c), the Bar must prove intent. *Fla. Bar v. Brown*, 905 So.2d 76, 81 (Fla.2005). "The intent element can be satisfied merely by showing that the conduct was *deliberate and knowing*." *Id.* (Emphasis added.)

In this case, Mr. Schwartz's conduct was deliberate and knowing, as he willfully and intentionally tampered with the photographic line-ups and entered them as exhibits during the deposition.

Florida Bar Rule 4-3.3(a) states that "A lawyer shall not knowingly: (1) make a false statement or law to a tribunal... (4) offer evidence that a lawyer knows to be false."

The Comments section of *West's F.S.A. Bar Rule 4-3.3* provides that

[this rule] also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a *deposition*... [and] the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

(Inserts added. Emphasis added.)

Mr. Schwartz knowingly misled the Victim into believing that the tampered photographic line-ups- the false evidence- were the line-ups she reviewed with the Detective.

The Comments section of *West's F.S.A. Bar Rule 4-3.3* also provides that

Subdivision (a)(4) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an *officer of the court* to prevent the trier of fact from being misled by false evidence... [t]he duties stated in this rule apply to all lawyers, including defense counsel in criminal cases.

(Emphasis added.)

Mr. Schwartz, as an officer of the court, has a duty not to mislead the jury by creating false evidence during the deposition- that of false identifications made by the Victim through trickery and deceit.

Florida Bar Rule 4-3.4(b) prohibits a lawyer from "fabricat[ing] evidence, counsel[ing] or assist[ing] a witness to testify falsely..." The Comments section of *West's F.S.A. Bar Rule 4-3.4* provides that "[f]alsifying evidence is also generally a criminal offense."

Dodd v. The Florida Bar reminds us that “the courts are...dependent [upon] members of the bar to...present the true facts of each cause...[when] an attorney...allows false testimony...[the attorney]...makes it impossible for the scales [of justice] to balance.” 118 So.2d 17, 19 (Fla. 1960); see also *The Fla. Bar v. Agar*, 394 So.2d 405 (Fla. 1981) and *The Fla. Bar v. Simons*, 391 So.2d 684 (Fla. 1980).

Mr. Schwartz, by his manner of questioning in the deposition and through the use of exhibits showing tampered and altered photographic line-ups, was intentionally and knowingly attempting to fabricate evidence and assisting the victim to testify falsely as to the identification of the person who robbed her, thereby causing a miscarriage of justice.

D. Fla. R. Civ. Pro. 1.310: Cross-Examination in Discovery Depositions

Fla. R. Crim. Pro. 3.220(h)(1) states, “Except as provided herein, the procedure for taking the deposition...shall be the same as that provided in the Florida Rules of Civil Procedure.”

Fla. R. Civ. Pro. 1.310(b)(1) provides that “[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action.” “The purpose of the notice requirement is to provide other parties with an opportunity to attend the deposition and to cross examine the witness.” 5 Fla. Prac., Civil Practice §10:6 (2014-2015 ed.).

Fla. R. Civ. Pro. 1.310(c) provides that the “[e]xamination and *cross examination* of the witness may proceed as permitted at the trial..[and] a party may instruct a deponent not to answer a question only when necessary...to present a motion [to terminate the deposition] under subdivision (d).” (Inserts added.)

Fla. R. Civ. Pro. 1.310(d) grants the trial judge authority to terminate or restrict a deposition based on a showing that it is "being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the deponent or party."

In this case, the Defense deprived the State's right to conduct its cross-examination of the Victim, pursuant to Fla. R. Civ. Pro. 1.310(c), when Mr. Schwartz immediately got up and left the deposition room after his questioning and ended the deposition.

E. *State v. Kuntsman*: Witnesses Cannot be Compelled to Make Identifications During Deposition

In *State v. Kuntsman*, the Third District Court of Appeals held that unless the defendant shows strong or compelling reasons, the trial judge has no authority to compel the witnesses to view a photo array created by the defense. 643 So.2d 1172, 1174 (Fla. 3d DCA 1994), attached as Exhibit D.

In *Kuntsman*, the court held there was no showing of strong or compelling reasons to compel the victim to view a photo array created by the defense attorney. 643 So.2d at 1173. During the deposition, defense counsel attempted to have the victim identify the criminal actions taken by each of the five defendants by having the victim look at a photo array created by defense counsel. *Id.* at 1172. This photo array consisted of thirty-eight black-and-white photographs, and included only four photos of the defendants. *Id.* at 1172-73. The State objected to the use of the photo array, and the victim refused to view or answer questions concerning the array. *Id.* at 1173. Defense counsel then certified the question. *Id.*

The *Kuntsman* Court cited to *State v. Ray*, 604 So.2d 1249 (Fla. 4th DCA 1992) and the Fourth District Court of Appeals' reasoning that "a criminal defendant's right to discovery and confrontation does not entitle the defendant to compel a prosecution witness to undergo an

involuntary examination of any sort.” *Id.* at 1173. The Court further discussed that “[t]he purpose of criminal discovery is ‘to avail the defense of evidence known to the state so that convictions [will] not be obtained by the suppression of evidence favorable to the defendant, or by surprise tactics in the courtroom.’” *Id.* at 1174 (citing to *Cooper v. State*, 336 So.2d 1133, 1138 (Fla. 1976)). (Inserts added.) The Court also cited to Fla. R. Crim. Pro.3.220 stating the rule “is not intended to provide defendants with an opportunity to build their cases during the discovery process by ‘creating’ evidence, i.e. misidentifications.” *Id.* (Emphasis added.) The court further reasoned that the defendants could have obtained the information they needed; i.e. that of the victim identifying the criminal actions taken by each defendant, “by conducting a proper deposition under the [discovery] rules.” *Id.* (Insert added.)

Similar to *Kuntsman*, Mr. Schwartz could have obtained the information he needed, i.e. how confident the victim is of her identification of the Defendant, by asking the proper questions during deposition *without* the use of tampered line-ups and *without* editorializing his defense theory that it was not the Defendant who robbed her, rather it was a later identified “dead person” who did it. (Emphasis added.) For example, Mr. Schwartz could have asked the Victim a number of questions such as, (a) “How confident are you of your identification of the Defendant as the person who robbed you? (b) Could you state a percentage of how confident you are? 50%? 70%? 100%? (c) Do you know anyone by the name of Fritz Len Joseph? Mr. Schwartz has no strong or compelling reason to have the victim be compelled to answer questions regarding his fabricated line-ups. Mr. Schwartz acted unethically and strayed away from the purpose of the deposition, that of availing the defense of evidence known to the State so that convictions will not be obtained by the suppression of evidence favorable to the defendant, or by surprise tactics

in the courtroom, *not* to allow the defense to build their cases during the discovery process by 'creating' evidence, i.e. misidentifications. (Emphasis added.)

F. Schwartz's History with the Florida Bar

Mr. Schwartz was admitted to the Florida Bar in 1986. None of the issues that took place during the deposition should have occurred, especially with counsel who has practiced law for almost 30 years. Mr. Schwartz should be well aware of the case law that states that witnesses are not required to make identifications in deposition and that counsel is not allowed to create evidence during depositions. Also, Mr. Schwartz should know that as a professional courtesy and customary practice, he should show the State the exhibits he intends to use in deposition before presenting it to the witness, so that the State has an opportunity to review it and state any objection on the record. Mr. Schwartz should know that cross-examination in a deposition is followed after direct examination. Mr. Schwartz must allow an Interpreter to do his/her job in translating and must allow for the accurate transcription of the testimony being taken by not interfering or interrupting with the Interpreter's task of translation.

Mr. Schwartz also has a history of discipline with the Florida involving dishonesty. *See* Mr. Schwartz's Florida Bar Discipline History attached as Exhibit E.

V. Conclusion

Based on the fore-mentioned, the State is requesting that the Court impose the following sanctions: (1) strike the Transcript of Continuation of the Deposition of Gersie Tellisma dated February 13, 2015, (2) prohibit Mr. Schwartz from re-deposing the Victim, (3) in the interest of justice, disqualify Mr. Schwartz as the attorney representing the Defendant, (4) refer the matter to the Florida Bar for disciplinary review, and (5) impose any other sanctions against Mr. Schwartz as the Court deems appropriate.

Wherefore, the State respectfully requests this Court to grant the State's Motion for Sanctions.

Respectfully Submitted,

Katherine Fernandez Rundle
State Attorney

By: 

/s/ Cristina M. Cabrera
Assistant State Attorney
Fla. Bar. No. 90940
1350 N.W. 12th Street
Miami, Florida
(305)-547-0100

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Sanctions, has been provided to Defense Counsel, Jonathan Stephen Schwartz and/or Jody Baker, in Open Court, this March 13, 2015.

By: 

/s/ Cristina M. Cabrera
Assistant State Attorney

AFFIDAVIT OF CINDY FERREIRO

BEFORE ME, the undersigned authority, personally appeared, CINDY FERREIRO, who being duly sworn, deposes and says that the facts stated below are true and correct.

1. I am presently a college student at the University of Miami scheduled to graduate in December, 2015. In January and February, 2015, I was an intern at the Miami-Dade County State Attorney's Office. I was assigned to work with Assistant State Attorney Cristina Cabrera.

2. On February 13, 2015, I attended the deposition of Ms. Gerdie Tellisma, the victim in the case of State v. Virgil Woodson, case no. F13-2946. I had never attended a deposition before, so I asked Ms. Cabrera if I could sit with her. Also present at the deposition besides Ms. Tellisma and Ms. Cabrera, was the defense attorney, who I later learned was Mr. Jonathan Schwartz, and his assistant, who I later learned was Ms. Jody Baker, as well as a Court Reporter and a Creole Interpreter.

3. Although it appeared that Ms. Tellisma did not need an interpreter, a Creole Interpreter was used.

4. At one point during the deposition, Mr. Schwartz began to interrupt the Interpreter before the Interpreter finished translating. There were times when Mr. Schwartz would interrupt Ms. Tellisma as she was answering in Creole. He became increasingly rude.

5. I was seated next to Ms. Cabrera. I do not recall seeing whether Ms. Cabrera made any signals with her hands.

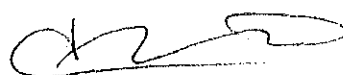
6. At one point during the deposition, Mr. Schwartz proceeded to ask Ms. Tellisma about a series of photographs. Mr. Schwartz showed the exhibit with photographs to Ms. Tellisma without first showing it to Ms. Cabrera. Ms. Cabrera then asked to see it. Mr.

Schwartz ignored Ms. Cabrera's request and continued to question Ms. Tellisma. He began to try to show Ms. Tellisma more photos.

7. Ms. Cabrera then asked to pause the deposition. Ms. Cabrera looked at the exhibit and said that picture number five in the exhibit was different from the lineup that was provided by the State and police. Ms. Cabrera objected to Mr. Schwartz using these exhibits and said she was going to go to the court. She stopped the deposition and asked for a moment. She told Mr. Schwartz not to ask any questions while she was gone.

8. A break was taken for Ms. Cabrera to go speak to a supervisor. I remained in the room. Mr. Schwartz continued to ask questions of the witness about the case. I said to him, "weren't you supposed to stop," and then he did. Ms. Cabrera returned to the deposition and again objected to Mr. Schwartz questioning Ms. Tellisma about the exhibits because they were misleading.

9. When Mr. Schwartz finished his questioning, he and Ms. Baker quickly left the room. The Court Reporter did not get the assistant (Ms. Baker)'s name because they left so fast.



AFFIANT

STATE OF FLORIDA, COUNTY OF MIAMI-DADE:

Sworn to and subscribed before me this 19th day of November, 2015, by
Cindy Ferreiro.



NOTARY PUBLIC, STATE OF FLORIDA

Personally Known _____

Produced Identification, type: Driver's License
FI



SANDRUS SMITH
MY COMMISSION # EE 215283
EXPIRES: August 17, 2016
Bonded Thru Budget Notary Services