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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1391

THE FLORIDA BAR FILE NO. 2016-70,106 (11J)

THE FLORIDA BAR,
Complainant,

-vs-

JONATHAN STEPHEN SCHWARTZ,
Respondent.

ANSWER BRIEF OF RESPONDENT

ON APPEAL FROM A REPORT OF REFEREE
HON. CELESTE H. MUIR, CIRCUIT JUDGE/REFEREE

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INTRODUCTION[1]

This appeal by The Florida Bar challenges a criminal defense lawyer's ethical representation of a client in a criminal case in which strong evidence existed of the client's "actual innocence" that had been completely ignored by a prosecutor intent on obtaining a conviction despite a serious question as to the identity of the perpetrator. Acting on the prosecutor's complaint, The Florida Bar accused the criminal defense lawyer (Respondent) of misconduct for utilizing a defense-created photo line-up during a deposition to test the crime victim's certainty as to the charged defendant's identification as the perpetrator. As found by the Referee after a trial, Respondent's conduct properly fulfilled his constitutional obligation as a criminal defense lawyer in testing the prosecution's evidence and witnesses, and pursued his valid identification defense in an ethical, forthright manner.

As found by the Referee, at no time did Respondent engage in conduct intended or likely to mislead the victim of the charged robbery. The victim, who was not called as a witness by The Florida Bar, was neither misled nor confused by Respondent's use of the defense-created photo line-up, again as found by the Referee. When asked by the prosecutor during the deposition about the defense-

[1] This Answer Brief utilizes the same references indicated in the Initial Brief. The Florida Bar is referred to by its proper name, as Complainant, or as the Bar. Respondent Jonathan Schwartz is referred to by his proper name or as Respondent. The Report of Referee is indicated as ROR followed by appropriate page numbers. The final hearing transcript is indicated by the letter "T" followed by a volume and page number. The exhibits are referenced as TFB Ex. and Respondent Ex.

created line-up exhibits shown to the victim-witness, Respondent readily explained to the prosecutor his creation of the defense photo line-ups and his intention of using them to determine whether the victim's identification of her assailant was really that of the alternate suspect, who was identified by independent witnesses as the actual perpetrator.

The Report of Referee contained detailed factual findings based on the trial record. The Referee also made credibility decisions, finding Respondent and the defense witnesses with knowledge of the events were truthful and credible. By contrast, the Referee found the former prosecutor-complainant, the only witness called by The Florida Bar, "presented the most troubling testimony[,]" that "was not supported by objective evidence." (ROR 20-21). The Referee found the testimony of The Florida Bar's witness to be "evasive, inconclusive, and did not establish the relevant facts with any degree of certainty." (ROR 21).

Upon consideration of the entirety of the evidence, the Referee made careful, explicit, and detailed findings and conclusions that Respondent did not engage in the charged conduct or commit any violations of professional standards (ROR 22-23):

> Based on the entirety of the evidence, this Court finds the Bar's proof did not establish that Respondent acted with any purpose or intent to deceive during the course of his handling the Tellisma deposition. The defense-created line-ups are not, in and of themselves, misleading, fraudulent, deceitful, or misrepresentations, and were not contrary to honesty or justice. Nor was the manner of use of the defense-created line-ups capable of misleading the witnesses. To the contrary, the evidence demonstrated that Mr. Schwartz's had only black and white

> photocopies of the state's evidence to work with, and the use of the defense line-up substituting the alternate suspect previously disclosed to the state was consistent with honesty and justice. The Respondent properly and carefully identified the exhibits as defense exhibits without the slightest misrepresentation. Moreover, his affirmative act of explaining to the prosecutor his creation of the line-ups and his inclusion of the alternate suspect in place of the defendant underscored his purpose and intent to act honestly and with integrity.

Disappointed with the Referee's findings and conclusions, The Florida Bar initiated this appeal by failing to present the record facts in the light most favorable to the Referee's findings, and presenting arguments that are inconsistent with the carefully detailed Report of Referee.

STATEMENT OF THE CASE AND FACTS

Respondent objects to the Statement of the Case and of the Facts contained in the Initial Brief (pages 3-17) inasmuch as they are improperly presented in the light most favorable to The Florida Bar. This approach is inconsistent with prevailing appellate standards that require the parties to present the facts in the light most favorable to the party who prevailed in the lower tribunal. *See Amjad Munim, M.D., P.A. v. Azar, M.D.*, 648 So. 2d 145, 148-149 (Fla. 4th DCA 1994).

Among the more argumentative "facts" presented by The Florida Bar in its most favorable light is the repeated use of the misleading and factually inaccurate description of the defense-created photo line-up as an "altered" exhibit, thus intending to suggest wrongdoing at the outset (Initial Brief 4, 10, 13, 15). In actual fact based on the record evidence, the defense did not use altered line-ups at all. To

the contrary, as testified to by the witnesses found to be credible by the Referee, the defense exhibit had been constructed in a black and white format by Respondent and his lawyer associate to depict the alternate suspect who had been identified by other witnesses (ROR 10). The defense-created exhibit differed from the color line-ups that had been shown to the witness by the police (ROR 10). The defense exhibit was constructed in good faith and not for any purpose to mislead (ROR 10-11). The Referee did not find that the defense had "altered" the actual police line-up.

A second example of the Bar's improper presentation of "facts" shown in The Florida Bar's most favorable light involves the inclusion of the complaining prosecutor's testimony (Cristina Cabrera), as though the prosecutor was credible or provided relevant testimony (Initial Brief 7-9, 12). The Referee rejected virtually the entirety of the prosecutor's testimony in a careful, record-based credibility finding that the complaining prosecutor (Cristina Cabrera) provided "troubling" and "evasive, inconclusive" testimony that was unreliable and "did not establish the relevant facts with any degree of certainty" (ROR 20-21), The Florida Bar presents her testimony as indicative of the facts.[2] The Bar's reliance on Cabrera's disbelieved and contrived testimony is contradicted by the record evidence and the Referee's factual findings.

[2] The Report of Referee accurately summarized Cabrera's testimony at pages 20-22, finding "Ms. Cabrera's testimony evasive, inconclusive, and did not establish the relevant facts with any degree of certainty." (ROR 21).

Contrary to the factual recitation contained in the Initial Brief, a complete and proper presentation of the pertinent facts must be derived from the Report of Referee that summarizes the reliable, credible record evidence (ROR 3-22). That record-specific presentation follows.

A. Jonathan Schwartz (Respondent).

Jonathan Schwartz was admitted to The Florida Bar in 1986 (T3:312). He practices primarily as a criminal defense lawyer, beginning his legal career as an Assistant Public Defender in Miami-Dade County (T3:314-318). His practice includes mental health and guardianship matters, traffic law, and limited civil litigation (T3:317-318). He has continuously involved himself and his law firm in *pro bono* matters (T3:318). During his testimony, Respondent acknowledged his prior Bar grievance matters, accepted full responsibility for the conduct leading to those grievances, and did not in any way attempt to skirt or deflect his acceptance of responsibility in those matters (T3:420-421).

The Referee found Mr. Schwartz to be forthright, honest, and credible throughout every aspect of his testimony (ROR 3). He answered all questions put to him, both on direct or cross-examination, in an earnest, helpful, and clear manner, evincing neither discomfort nor distaste (ROR 3). He readily understood the gravity of the proceedings, and expressed no animosity toward his accuser (Cabrera) (ROR 3). He was resolute in offering detailed facts demonstrating his development of a

mistaken identification defense (ROR 3-4). He had no intention of engaging in any unacceptable, inappropriate, or unprofessional conduct (ROR 3-4). His intention and actions were to conduct a legitimate, constitutionally allowable challenge to an eyewitness identification, after having first brought the favorable evidence and witnesses to the attention of the prosecutor handling his client's case, including evidence that identified another person as possibly the actual perpetrator (ROR 4).

Mr. Schwartz was lead defense counsel in the case of *State v. Virgil Woodson*, Circuit Case No. F13-012946 (Miami-Dade County) (T3:323-326). Woodson was a juvenile at the time of the alleged crime, and consistently professed his actual innocence (T3:324). Mr. Schwartz conducted an extensive investigation in the course of his representation of Woodson, during which he uncovered credible evidence that another person may have been the actual perpetrator, and that Woodson might have been identified by an unconstitutionally suggestive police photo line-up (T3:327-330).

Contrary to the prosecutor's accusation that formed the basis for the Bar's complaint, the Referee found that Respondent comported himself professionally throughout the entirety of the witness deposition (ROR 9-10). Witness Tellisma spoke Creole and required the use of a Creole-English Court Interpreter (T3:366; ROR 9). There was no evidence that the witness spoke, understood, or read English (T3:366, 389; ROR 9). Respondent was at all times respectful to the witness and all

participants at the deposition, including the prosecutor, in contradiction to the prosecutor's contrary testimony (ROR 9-10). Respondent made sure the witness was able to have counsel's questions and her answers fully translated, and that the Creole interpreter had experience in criminal matters (ROR 10). Respondent proceeded patiently throughout the deposition and did not create the uncomfortable atmosphere for the witness that was described by the prosecutor in her complaint (ROR 11-12).

With the assistance of his law firm associate, Respondent prepared defense-created black and white paper photo line-ups by taking a photocopy of the police line-ups provided in discovery, and superimposing the photograph of the alternate suspect (who had been identified as the perpetrator by other witnesses disclosed to the prosecution) (T3:347-349; ROR 10).[3] Knowing the actual police photo line-ups were in color, Respondent created black and white defense line-ups solely for the purpose of determining at the deposition whether the victim could identify the known alternate suspect as the perpetrator (T3:345-348, 360-361; ROR 10).

As the deposition and exhibits demonstrated, the defense-created black and white line-ups contained all the information on the original police color line-ups (T3:352-354, 359; ROR 10). Respondent did not identify, point to, or use any of the existing information on the police line-ups when questioning the witness (T3:363-

[3] Respondent testified he would have committed malpractice if he had included his client's photo in the defense-created line-up, thereby giving the witness an opportunity to identify his client in a line-up that was not unduly suggestive (T3:370).

367; ROR 10). To the contrary, Respondent "clearly and specifically" identified the defense-created line-ups as "my Exhibit Number Two" and directed the witness to "forget about what you did before." (T3:363; TFB Exhibit 1, p. 25; ROR 10). The prosecutor even interrupted Respondent's examination by reminding the witness about the police photo line-up and asking her if the lineup "was in color or was it in black and white?" (TFB Exhibit 1, p. 26; ROR 10-11).[4] Respondent had not asked the witness anything about a police-supplied line-up (T3:373).

Specifically referring to his defense-created line-up that had been properly marked by the Court Reporter and shown to the prosecutor in the ordinary course of the deposition (contrary to the prosecutor's rejected testimony), Respondent introduced the defense line-up by stating to the witness: "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." (TFB Exhibit 1, p. 28; ROR 11).

The witness noted the photocopied black and white photo line-up was "so black I can't even remember him. And the only person I can see that I remember that looked like him was the first one." (T3:368-369; TFB Ex 1, p. 28; ROR 11). The witness did not identify the alternate suspect whose photograph had been cut and pasted with lines still visible (at position 5) on a black and white copy of the police

[4] The Referee noted that even though the prosecutor's interruptions appeared designed to influence the witness's testimony, Respondent responded professionally at all times as he tried to complete the deposition (ROR 11, n. 2).

line-up, but commented on the first picture "that looked like him" (ROR 11). The witness explained she "could not saw his face because he had the hood on his head." (TFB Ex. 1, p. 29). She did not recall whether the initial photo lineup she viewed was in black and white or color (TFB Exhibit 1, p. 26, line 2).

The Referee carefully observed Mr. Schwartz throughout the proceedings, and evaluated the entirety of his testimony individually and in the context of the entire case (ROR 4). The Referee found as a matter of fact that Mr. Schwartz told the truth in explaining his use of the defense-created photo line-up (ROR 4). His testimony led the Referee to find, as a matter of fact and credibility, that Respondent acted without any purpose or intention to deceive (T3:361-362; ROR 4). His conduct was not dishonest or fraudulent (ROR 4). He did not act in a deceitful manner (ROR 4). He made no misrepresentation whatsoever in the course of his conduct at issue in these proceedings (ROR 4). He did not fail to apprise either the prosecutor or the witness of material or relevant information concerning the defense-created photo line-up (ROR 4). The Referee found as a matter of fact and law that Mr. Schwartz made proper explanations and gave appropriate cautionary instructions when utilizing the black and white defense-created line-ups during the deposition of the victim, Gerdie Tellisma (ROR 4).

Even when asked by the prosecutor about the defense-created line-ups during an off-the-record conversation called by the prosecutor, Respondent

explained the origination and purpose of the defense-created line-ups, and identified the picture of the alternate suspect in the line-ups (T3:388-389; ROR 4-5). He did not make any effort to hide his defense-created exhibits, as he explained to the prosecutor how he created them (T3:381-383, 387-388, 392). The Referee found Respondent's testimony, his conduct during the deposition, and his contemporaneous explanations to the prosecutor all corroborated that he acted in a good faith, honest effort to test the witness's identification of the defendant as the perpetrator, after having filed a motion to suppress the impermissibly suggestive police photo line-up that was the sole basis for the robbery charge against Respondent's client (T3:342-344; ROR 5).

The Referee further found there was no attempt by Respondent to "create a misidentification" of his client, and no attempt to have the witness re-do the initial identification she made of Respondent's client using a black and white copy of the color photographic line-up (ROR 5). This was, the Referee found, consistent with Respondent's understanding of allowable defense challenges to mistaken identification (T3:374-377) as expressed in *State v. McWilliams*, 817 So. 2d 1036 (Fla. 3d DCA 2002), in which the Third District 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 he or she selected, the witness is free to review the exhibit in its entirety, including the reverse side of

> the individual photographs, to determine which photograph he or she initially selected. *Id*. at 1037, n.l (emphasis added).

The Referee found that Respondent's use of "the sloppy black and white photocopies" to test an alternate suspect defense would have limited effect, contrary to what the prosecutor feared (ROR 5).

The Referee specifically noted that until the State Attorney's Office provided color copies of the actual police line-ups shown to witnesses, or brings the original documents to verify a defendant's identification, defense lawyers can only follow the precedent of S*tate v. McWilliams* by using defense-created black and white line-ups to show to witnesses (ROR 5-6).

The Referee found that it was readily apparent that substituting an alternate suspect in a black and white version of a color photo line-up is not the same as presenting the witness with the actual line-up (ROR 6). Mr. Schwartz copied the prosecution-supplied line ups to see whether the witness recognized a man others had identified as an alternate suspect (ROR 6).

Respondent's effort to "ask which photograph he or she selected" – as allowed by *State v. Williams* – Respondent used his own black and white version of the police color line-up to question the victim who initially identified Respondent's client in what Respondent argued was an unduly suggestive line-up. This, the Referee found, was in accordance with Respondent's understanding of *State v. McWilliams*. He created his own defense exhibits, with the alternate suspect's photo

(with two different hairstyles) that were obvious as "cut and pasted" over the circled photo of Respondent's client from the original color line-ups (T3:374-377; ROR 6).

The Referee found Respondent made a "messy (but clearly not deceitful) effort to comply with *State v. McWilliams* with only black and white copies of the state's photographic lineups that the state had given him in discovery." (ROR 7). Respondent left the prosecution's copies "as is" with the date and signatures of the deponent and the detective on his defense-created exhibit but specifically admonished the witness to "forget about what you did before." (T3:363-364; TFB Ex. 3; ROR 7). Although the circle around photo 5 remained, the Referee found the witness herself was not confused or misled by substitution of the alternate suspect's photo when Respondent questioned her about "my exhibits." (ROR 7).

After Respondent said to the witness to "forget about what you did before" and "to pick out the person, if you know, who was the one who robbed you, if you can tell me," the witness was unable to do anything after looking at the black and white line-ups other than to say "And the only person I can see that I remember that looked like him was the first one." (TFB Exhibit 1, p. 28, line 19; ROR 8). The witness also admitted that she had been shown by an investigator "only one photo" (T3:398). Tellisma's deposition showed her to be a candid and credible witness as to the robbery, as found by the Referee (TFB Exhibit 1, p. 28. Line 6; ROR 8).

Respondent presented a different version of the defense-created line up that

the Court Reporter marked as Exhibit Number Three (T3:385; TFB Exhibit 1, p. 29). Before Respondent showed the defense exhibit to the witness, the prosecutor asked for an off-the-record discussion (T3:388; TFB Exhibit 1, p. 29). During this break, Respondent explained to the prosecutor that he created both defense line-ups, and that he inserted a photograph of the previously identified alternate suspect in place of the defendant's photograph (T3:388-392; ROR 12). The Referee fully credited Respondent's testimony on this important point, especially considering that the prosecutor's testimony was fond by the Referee to be "intentionally vague, when she claimed to not recall whether she participated in the off-the-record conference as described by defense counsel." (ROR 12).

Once back on the record, the prosecutor objected to Respondent's use of the defense-created line-ups in the presence of the witness and with the Court Interpreter translating into Creole (T3:398-399; ROR 12). The prosecutor's objection included what the Referee found to have been a "clear instruction by the prosecutor to the witness" that "Photo number five is significantly different from the photo lineup that was provided by the state from the police officers and it appears ... that at the bottom of Exhibit 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." (TFB Exhibit 1, p. 30; ROR 12-13). After the prosecutor's intended coaching of the witness, Respondent was able to show Exhibit Number Three to the

witness (T3:394-395). When doing so, he provided this caveat: “look at them as if you’ve never seen them before ...” (TFB Exhibit 1, p. 31; ROR 13). Respondent explained during his testimony that his intention was to make sure the witness understood this line-up should not be confused with any police line-up or photographs she had seen before (ROR 13). The witness was unable to identify any photos because “[t]he picture is too black.” (TFB Exhibit 1, p. 31).

The prosecutor then stopped the deposition. As she left the room, Respondent discontinued the deposition until the prosecutor's return, at which point he proceeded to question the witness about Exhibit Number Four, a photocopy of one of the line-ups actually shown to the witness by the police, but the witness did not recall ever seeing that line-up (T3:397; TFB Exhibit 1, p. 32-33).

The prosecutor could have objected – but did not – to questioning regarding the defense-created exhibits until a ruling by the assigned judge, as the Referee found (ROR 7). The prosecutor knowingly chose not to do so after an opportunity to recess the deposition, and, according to the Referee, wisely allowed the deposition to move forward on a Friday afternoon so the criminal case could be concluded (ROR 7). This was the second time (due to the witness becoming ill during the first deposition) that the witness had been scheduled for deposition (T3:340-342; ROR 7).

The Referee flatly rejected the prosecutor’s accusation of “photoshopping” the police line-ups that had been copied in black and white and provided to the

defense, finding the "only purpose" for substituting the known alternate suspect identified by that suspect's former girlfriend, a defense witness made known to the prosecution, was to redirect the prosecutor's attention to an alternate suspect, not to create misidentification evidence in the case of *State v. Woodson* (ROR 7).

The Referee found fault with the prosecutor's decision to withdraw the state's sanctions motion for a timely and fair resolution by the knowledgeable judge assigned to the case (ROR 8). The consequence of the prosecutor's calculated decision was to punish Respondent "by the lengthy and expensive procedures that the grievance proceeding has entailed." (ROR 8). This impact has not been ignored by Respondent. The Referee found that Respondent fully acknowledged that his handling of future alternate suspect defenses will involve obtaining judicial approval for the use of defense-created line-up exhibits (T3:453; ROR 8).

The Referee found that Respondent's prior discipline did not involve conduct that weighs on the findings of facts (ROR 9). Respondent readily accepted responsibility for that prior conduct, a fact that weighed favorably in support of the Referee's assessment of his credibility and motivation (T3:420-421; ROR 9).

Respondent testified he has been actively involved in criminal justice cases and educational programs throughout his entire career, and is well aware of the constitutional dangers inherent in mistaken eyewitness identifications (T3:348-354, 357, 377). He has attended professional programs and has been involved in actual

innocence presentations during which lawyers are attuned to the importance of making good faith, allowable challenges to questionable eyewitness identifications (T3:377). He testified that his experience with mistaken identification cases led him to understand that experienced prosecutors were often open to defense presentations of actual mistaken identification cases, but that the prosecutor in this case (Cabrera) was openly dismissive of his efforts to bring material evidence and witnesses to the prosecutor's attention concerning the likelihood of another person as the actual perpetrator of the charged crime (T3:332-335, 338-339). Respondent was sensitized to the importance of carefully pursuing the possibility of a mistaken identification in this case because, in his opinion, the State Attorney's Office had in the past prosecuted mistakenly-identified defendants. The prosecutor in this case, Respondent explained, was uninterested in evidence of Woodson's innocence, and was believed to have been responsible for prosecuting a factually innocent man in a different case based on highly questionable identification evidence (T3:334-339).

Respondent believed his use of defense-created line-ups that he specifically distanced from the actual police line-ups was a proper and legitimate defense function that was neither misleading nor intended to mislead the witness (T3:361-362). Respondent was familiar with the governing case law on the use of defense techniques to challenge eyewitness identifications when justified by the specific facts and circumstances of a true mistaken identification case (T3:349-354, 357).

That legal authority included *State v. McWilliams*, 817 So. 2d 1036 (Fla. 3d DCA 2002), and *State v. Kuntsman*, 643 So. 2d 1172 (Fla. 3d DCA 1994). That precedent, as understood by Respondent from his own research and experience and as corroborated by criminal defense educational programs such as those sponsored by the Florida Association of Criminal Defense Lawyers and the National Association of Criminal Defense Lawyers, allows lawyers to utilize in good faith police line-ups and to create their own line-ups when needed to test the accuracy of witness identifications. The necessity of doing so in a case involving actual evidence of another person being the actual perpetrator is constitutionally paramount, according to Respondent (T3:349-354, 374-377).

Respondent was shocked to become the subject of a Motion for Sanctions filed by the prosecutor one month after the deposition had concluded (T3:404, 409). The prosecutor's sanctions motion claimed had attempted to mislead the witness at the deposition. When it became apparent the prosecutor had expressed personal animus against him, Respondent reassigned responsibility for the case to Jody Baker McGuire, his law firm associate who had been working on the case alongside him (T3:407). Respondent's decision to take himself out of the active defense of his client proved to be an effective one, according to the Referee, as Ms. McGuire was able to obtain a "Boot Camp' resolution for the client in his three pending cases, when the prosecutor had previously insisted that Woodson would have to serve a

lengthy prison sentence, even though he was a juvenile at the time of the charged crime (T3:340; ROR 8-9).

As part of the plea resolution of the underlying case, Respondent explained, the prosecutor affirmatively and voluntarily withdrew the Motion for Sanctions when the presiding judge inquired as to setting a hearing on the prosecution's motion (T3:418-419). Respondent was surprised when the prosecutor filed the same misconduct claim against him with The Florida Bar (T3:419). According to Mr. Schwartz's understanding, the prosecutor's complaint came at a time when she was separately responsible for prosecuting a factually innocent defendant in another case, and was leaving the State Attorney's Office for private practice. The Referee found that the prosecutor's sworn complaint contained factual inaccurate accusations of Respondent acting disrespectfully and unprofessionally during the deposition, none of which is reflected in the transcript (ROR 16). The Referee found that the deposition transcript and the court reporter's testimony supported Respondent's version of events (ROR 16).

Respondent was humbled by having to respond to the complaint that resulted in the disciplinary proceedings (T3:377, 409, 429; ROR 16). The proceedings put much Respondent's professional life on hold during the lengthy grievance process (June 2015 to May 2018) (T3:429; ROR 16). Although Respondent did not believe he acted in any improper or unprofessional way during the deposition, the Referee

found he candidly offered that he would never again utilize that form of a defense-created line-up without preclearing the technique with a prosecutor or judge (T3:453; ROR 16). While he understood his defense-created exhibits were not intended to mislead anyone, he acknowledged that the fact that a prosecutor claimed his conduct was unprofessional has made him very cautious when pursuing subsequent misidentification challenges (T3:453; ROR 16-17).

B. Jody Baker McGuire.

Ms. Baker McGuire is an associate with Respondent's law firm (T3:459-460). She worked on the Woodson criminal case with Respondent, and took over lead responsibilities when the prosecutor began to show personal animosity against Respondent (T3:461-463). Both she and Respondent were concerned their client could not receive fair treatment by the prosecutor who appeared to dislike Respondent (T3:463-464, 475). She ultimately resolved the client's three pending cases with a favorable "Boot Camp" resolution, due in part to the likelihood that the client's identification as the perpetrator was weak and that other witnesses had identified another person as the actual perpetrator, all of which was developed through careful and attentive efforts to show that the victim's police line-up identification was unconstitutionally suggestive.

Ms. McGuire testified that she worked with Respondent to develop the defense-created line-up exhibits (T3:463-465). She never thought the defense

exhibits were altered, misleading, deceitful, fraudulent, or a misrepresentation (T3:465-467). She did not believe the black and white copies of copies represented a forged or fraudulent alteration of the actual police color line-ups (T3:464-466). She did not observe Respondent at the deposition act in any manner to mislead the victim-witness (T3:479). Throughout the deposition, as Ms. McGuire explained, Respondent made a significant effort to identify the line-ups as defense exhibits that were to be looked at independently of any prior police line-up (T3:465). Respondent acted professionally during the deposition, and never rushed the witness or attempted to hide the line-up exhibits from the prosecutor (T3:466-469).

The victim-witness did not appear to have been misled or taken advantage of by Respondent (T3:470-472). Nor did Ms. McGuire observe the prosecutor having trouble seeing or examining the defense-created line-ups (T3:468-469). Ms. McGuire confirmed that Respondent explained to the prosecutor during an off-the-record conversation that he had created the defense line-ups from a copy of the police color line-ups, and had substituted the alternate suspect's picture in place of the defendant's picture (T3:466-467).

When she finally worked out a resolution of the case with the prosecutor, Ms. McGuire understood the prosecutor's sanctions motion would be withdrawn (T3:475-476). The prosecutor had actually "high fived" another prosecutor in the courtroom when first filing the sanctions motion against Respondent (T3:474). At

the hearing on the client's change of plea, the prosecutor affirmatively withdrew the sanctions motion when the presiding judge asked about the prosecutor's intention to schedule a hearing on the matter (T3:475-476).

C. Court Reporter Susan Mahmoud.

Susan Mahmoud, the Court Reporter for the Tellisma deposition, testified that she observed no unprofessional conduct by Respondent during the deposition (T2:241-245). Respondent was respectful to the witness, did not appear to mislead the witness, and never attempted to hide exhibits from the prosecutor (T2:233-239). Ms. Mahmoud explained that she marked the defense exhibits in full view of the prosecutor, and was confident the prosecutor could see and examine the defense exhibits before they were shown to the witness (T2:230-231). When asked about the prosecutor's claims that Respondent attempted to rush through the exhibits so the prosecutor would not have a chance to see the exhibits, Ms. Mahmoud flatly denied anything like that occurred (T2:239, 245-246, 248). As she explained, the deposition took place in the prosecutor's small office, and all participants were situated so close to one another that it was impossible to hide exhibits from anyone (T2:232-234).

Ms. Mahmoud never saw the prosecutor making “hand signal” objections in lieu of objecting on the record (T2:241-242). Ms. Mahmoud testified that the prosecutor’s representation at the conclusion of the deposition that Respondent quickly left the deposition and prevented her from asking questions was incorrect,

and that the deposition instead had ended normally (T2:245-248). She testified to being surprised, as she was packing up at the conclusion of the deposition, when the prosecutor asked her to go back on the record after Respondent had left, to say that Respondent prevented the prosecutor from asking questions (T2:246-247). The Court Reporter did not have any special relationship with Respondent, and believed the Tellisma deposition was the first time she had reported for Respondent's law firm (T2:229).

D. Barry Wax, Expert Criminal Defense Lawyer Witness.

Barry Wax, a highly credentialed and experienced criminal defense lawyer, was accepted by the Referee and testified as an expert witness (T2:250-253; ROR 20). The Referee found Mr. Wax provided compelling evidence that Respondent acted consistent with Florida case law and professional obligations when using the defense-created line-ups during the deposition (T2:263-275, 276-286; ROR 20). Mr. Wax explained that the defense-created line-ups were not inherently misleading, and were not employed in a misleading manner (T2:286-287; ROR 20). He further testified that effective criminal defense lawyers must be creative when challenging potentially mistaken victim identification (T2:292-300; ROR 20). Not only would it constitute ineffective assistance of counsel for Respondent to have not challenged the accuracy of the victim's identification of the defendant, but also the pretrial motion to suppress was a ready indicator that the police line-up was constitutionally

suspect (T2:264; ROR 20). The process used by Respondent in presenting the witness with the defense-created line-ups attempted to avoid any misleading of or misperception by the witness (ROR 20).

E. Cristina Cabrera, Complaining Witness.

Cristina Cabrera, the complaining witness and former Assistant State Attorney, presented the most troubling testimony, according to the Referee (ROR 20-21). The Referee carefully examined her testimony and demeanor during the hearing, and concluded her version of the events occurring during the Tellisma deposition was not supported by objective evidence (ROR 21). As an experienced prosecutor, the Referee found Ms. Cabrera to be well-versed in making a record of objections during a deposition (ROR 21). The Referee rejected as unbelievable her testimony and sworn accusations that she used "hand signals" to inform Respondent that she wanted him to stop or slow down or otherwise change his conduct (ROR 21). Cabrera's questionable testimony was outweighed by the more credible testimony of other witnesses, especially Respondent, according to the Referee (ROR 21). The Referee did not credit Cabrera's testimony that she was unable to see the defense exhibits or make objections due to Respondent's deposition conduct (ROR 21). To the contrary, the Referee found that the entirety of the evidence showed that Cabrera was both aware of the defense-created photo line-ups and informed by defense counsel that the line-ups had been created by the defense substituting the

alternate suspect in place of the defendant's photo (ROR 21). The Referee found Ms. Cabrera was not misled by the defense examination, and there was no likelihood the witness was misled (ROR 21). The Referee specifically found Ms. Cabrera's testimony to be evasive and inconclusive, and did not establish the relevant facts with any degree of certainty (ROR 21).

The Referee was equally troubled by the prosecutor's withdrawal of the motion for sanctions after the Circuit Judge had taken jurisdiction of the very matter that formed the basis of the prosecutor's later-filed Bar complaint (ROR 21). The prosecutor's voluntary removal of Circuit Court jurisdiction over the same complaint was found by the Referee to have been motivated by an intention to move the complaint from one jurisdiction familiar with similar cases (Circuit Court) to a forum (the Bar grievance process) less likely to promptly and efficiently resolve the matter by instituting grievance proceedings that can be more lengthy and costly to a charged lawyer (ROR 21-22).

STANDARD OF REVIEW

This Court set forth the legal standard for review of Referee's Reports and Recommendations in *The Florida Bar v. Martocci*, 699 So. 2d 1357 (Fla. 1997):

> In bar discipline cases, an attorney may be found guilty only if the referee concludes that the alleged misconduct was proven by clear and convincing evidence. *Florida Bar v. Neu*, 597 So. 2d 266, 268 (Fla. 1992). Further, a referee's findings of fact carry a presumption of correctness which will be upheld on review "unless clearly erroneous or lacking in evidentiary support." *Florida Bar v. Stalnaker*, 485 So. 2d

> 815, 816 (Fla. 1986); *Florida Bar v. Neely*, 502 So. 2d 1237 (Fla. 1987). If the referee's findings "are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee." *Florida Bar v. MacMillan*, 600 So. 2d 457, 459 (Fla. 1992); *Florida Bar v. Weed*, 559 So. 2d 1094 (Fla. 1990). Since the Bar is challenging the referee's findings of fact, it has the burden of showing that the referee's report is clearly erroneous or unsupported by the record. *Florida Bar v. Lanford*, 691 So. 2d 480, 481 (Fla. 1997) (citing *Neu*, 597 So. 2d at 268).

See also The Florida Bar v. Vannier, 498 So. 2d 896, 898 (Fla. 1986) (referee's factual findings and recommendation as to guilt have a presumption of correctness and must be sustained "unless clearly erroneous or without support in the record."); Rule 3-7.7(c)(5) of the Rules Regulating The Florida Bar ("[u]pon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified.").

In a non-jury trial, the trial court's function is to evaluate the witnesses and weigh the testimony and other evidence to arrive at findings of fact. *Puritz v. Rosen*, 442 So. 2d 278, 280 (Fla. 4th DCA 1983). When reviewing the facts, the appellate court must disregard conflicting evidence and accept the facts in evidence which are most favorable to the party who prevailed below. *Blue Lakes Apts. Ltd. v. George Gowing, Inc.*, 464 So. 2d 705, 708 (Fla. 4th DCA 1985); *Anastasio v. Summersett*, 217 So. 2d 854 (Fla. 4th DCA 1969).

SUMMARY OF THE ARGUMENT

The Florida Bar did not prove by clear and convincing evidence that Respondent engaged in misconduct and deception in the course of a deposition of the victim in a robbery case. Defense counsel's use of a defense-created line-up to test the accuracy of the victim's identification of the defendant was consistent with Respondent's understanding of the law, and was not done in any misleading or deceitful manner. Respondent's conduct was at all times done in good faith and in a manner consistent with constitutional, professional, and ethical responsibilities.

ARGUMENT

THE REPORT OF REFEREE IS SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE (Restated).

As found by the Referee, The Florida Bar presented a legally insufficient case to support a finding of a violation of Rules 3-4.3 and 4-8.4(c) of the Rules Regulating The Florida Bar. The Bar accused Respondent Jonathan Schwartz of misconduct in violation of those rules by engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation..." in connection with Respondent's use at a criminal case deposition of a defense-created photo line-up to test the accuracy of the prosecution witness' identification of the defendant as the perpetrator of a robbery. The record evidence reflects that Respondent, representing the defendant, had a reasonable, good faith belief the defendant had been misidentified by the victim as a result of an

unduly suggestive photo line-up administered by the police.

Respondent had created a defense line-up that substituted a photo of the alternate suspect who had been identified by other witnesses as the actual perpetrator. He presented two versions of the defense-created line-up to the victim at a deposition, carefully instructing the witness to examine the photographs to see if she recognized her perpetrator. He explained to the witness to forget any prior photo line-up and just focus on the pictures. He did not provide any indication to the witness that she had seen either the line-ups of the photographs before. When the witness was unable to identify the alternate suspect as her perpetrator, Respondent concluded the deposition. His use of the defense-created line-ups did not mislead the witness or the prosecutor, and was done with the good faith intention of challenging the accuracy of a potentially mistaken identification, as found by the Referee based on the record evidence (ROR22-23).

The Bar argued at the final hearing that Respondent's defense-created line-up was an intentionally misleading alteration of the actual police photo line-up, but offered no evidence in support of its theory. The undisputed evidence demonstrated that the defense line-ups were black and white versions of the color photo line-ups used by the police, created by Respondent to insert the alternate suspect as one of six choices on the page. The alternate suspect's picture had been cut and pasted onto

the black and white copy. Presenting the line-ups to the victim was not accompanied by any direction or effort to make the witness believe she was looking at the actual police photo line-ups.

A. The Bar's Evidence Did Not Prove Dishonesty, Misrepresentation, Deceit, or Fraud.

As explained in the definitions to the charged Rule, a violation of Rule 4-8.4(c) requires proof of "a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." "In order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the Bar must show the necessary element of intent." *The Florida Bar v. Forrester*, 818 So. 2d 477, 483 (Fla. 2002). That proof must be by clear and convincing evidence. *The Florida Bar v. Cramer*, 643 So. 2d 1069, 1070 (Fla. 1994).

Based solely on the evidence presented by The Florida Bar, consisting of the complaining witness who was found to not be credible by the Referee, the line-up exhibits, and the deposition transcript, the Referee found that the Bar's proof did not establish by clear and convincing evidence that Respondent acted with any purpose or intent to deceive during the course of his handling the deposition of a prosecution witness in a serious criminal case in which the good faith defense was mistaken identification and an alternate perpetrator. The Bar's case for "dishonesty, fraud,

deceit, or misrepresentation" was based entirely on the use of a defense-created line-up, fashioned from a black and white photocopy of a color police line-up actually shown to the witness, to question the witness about her possible perception of the alternate suspect as the perpetrator.

The Referee's findings of fact, based on solid evidentiary support in the record, must be accepted by the Court on appeal. The proven facts did not show that Respondent acted with any purpose or intent to deceive during the course of his handling the Tellisma deposition. As found by the Referee, the defense-created line-ups were not, in and of themselves, misleading, fraudulent, deceitful, or misrepresentations, and were not contrary to honesty or justice. Nor was the manner of Respondent's use of the defense-created line-ups capable of misleading the witness. To the contrary, the evidence demonstrated that Respondent's use of black and white photocopies of the police color line-ups, substituting the alternate suspect previously disclosed to the prosecutor, was consistent with honesty and justice. Respondent specifically identified the exhibits as defense exhibits without any actual or perceived misrepresentation. His affirmative act of explaining to the prosecutor his creation of the line-ups and his inclusion of the alternate suspect in place of the defendant underscored his purpose and intent to act honestly and with integrity. He made certain the witness examined the defense-created line-ups without any

reference to the police line-ups, and did make any attempt to suggest he was using the actual police line-ups.

The Bar offered no evidence, and none was presented in the record, that Respondent "knowingly and deliberately made the alleged misrepresentations." *The Fla. Bar v. Fredericks*, 731 So. 2d 1249, 1252 (Fla. 1999). To the contrary, as established by the evidence and as found by the Referee as a matter of fact, Respondent made no affirmative or implied "misrepresentations" at all. The Florida Bar's citation of *Fredericks* for the proposition that Respondent's conduct was "deliberate and knowing," and therefore intentionally dishonest, misapplies *Fredericks*, a case involving a lawyer's affirmative misrepresentation of the status of a non-existent lawsuit. For a period of seven years, Fredericks misrepresented the status of his client's matter. *Id*. at 1252. Because of this, the Supreme Court concluded, Fredericks "knowingly and deliberately made the alleged misrepresentations. Further, nothing in the record indicates that the misrepresentations were made negligently." *Id*.

Applying *Fredericks* to Respondent's conduct, the Referee concluded Respondent made no misrepresentations at all, whether knowingly, deliberately, or negligently (ROR 24). To the contrary, Respondent's representations were accurate, and the entirety of his conduct did not fail to sufficiently inform the witness and the

prosecutor that his presentation of the defense-created line-ups was for the singular purpose of determining whether the witness could identify the alternate suspect.

The Bar's citation to *The Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002), as supportive of a case for discipline, is equally misplaced. *Forrester* involved clear evidence of a lawyer concealing a document during a deposition and then making an intentional misrepresentation regarding the document's whereabouts. These facts are the antithesis of Respondent's conduct, since he never concealed any document, and made no misrepresentation concerning the creation or use of the line-ups. Instead, he was up front and open about his creation of his own version of a line-up. Although the complainant asserted that Respondent attempted to hide the defense-created line-ups from her, the Referee found that the record and the credible witness testimony proved that was not the case.

The Referee, having observed the witness demeanors, presentations, and motivations, "is in a unique position to assess the credibility of witnesses …" *The Florida Bar v. Thomas*, 582 So. 2d 1177, 1178 (Fla. 1991). Because the complainant's discredited testimony upon which the Bar relies was found to be incredible and in conflict with the entirety of the evidence, the Referee's responsibility to assess credibility based on demeanor and other relevant considerations is entitled to acceptance on appeal. *The Florida Bar v. Hayden*, 583

So. 2d 1016, 1017 (Fla. 1991).

Nor does *The Florida Bar v. Head*, 84 So. 3d 292 (Fla. 2012), support the Bar's argument. That disciplinary case, involving a violation of Rule 4-8.4(c), arose from a lawyer's presentation of an affidavit containing a false representation and authoring a letter that falsely claimed a lawsuit had been filed, when in fact no lawsuit had yet commenced. *Id*. at 295. The referee found the "[r]espondent's testimony on this issue not credible and noted that [r]espondent's testimony directly conflicts with the plain language of an email he sent to Allen that evening." *Id*. at 295. Accordingly, when reviewing the referee's finding in favor of discipline, the Supreme Court found that the "referee's findings of fact are supported by competent, substantial evidence in the record …" *Id*. at 298.

Here, Respondent Schwartz here made no misrepresentation, nor did he claim that a case existed when it did not. He did not inform the witness that she had seen the defense-created line-ups before, or even suggest that she previously circled the picture appearing on the line-ups. To the contrary, he studiously avoided creating any false impression, even as he explained the truth to the prosecutor about the defense-created line-ups.

T*he Florida Bar v. Miller*, 863 So. 2d 231 (Fla. 2003), provides a clear example of when circumstances justify a referee's finding of a lawyer making

intentional misrepresentations. That disciplinary case arose out of conduct in an employment discrimination case in which the lawyer "failed to disclose a crucial piece of evidence that he knew was the main focus of the legal proceeding and intentionally interfered with the legal process. The referee further stated that Miller had engaged in a pattern of deceit throughout the case and that he did not concede that he received the letter until he was exposed at the hearing before the magistrate judge." *Id*. at 234.

Unlike *Miller*, Respondent here disclosed his preparation of the defense-created line-up. He demonstrated no deceit throughout the proceedings, but was open and transparent about his effort to test the validity and reliability of the victim's identification of her perpetrator. Respondent did not own up to the truth only when he was caught, but was affirmatively truthful during the entire process of taking the victim's deposition.

The Florida Bar v. Nunes, 734 So. 2d 393 (Fla. 1999), provides a helpful approach to determining when a lawyer's conduct involves making "statements prejudicial to the administration of justice and/or that [he] knew to be false or with reckless disregard as to their truth or falsity concerning the integrity or the qualifications of the trial judges handling the [civil] litigation." *Id*. at 394-395. That lawyer's conduct made a mockery of judicial proceedings, and falsely impugned the

integrity of the judicial system. Respondent, by comparison, embraced the validity of the legal system in openly and transparently seeking to suppress an unconstitutionally suggestive line-up, and challenging the accuracy of the victim's identification in an open deposition attended by an experienced prosecutor and several disinterested professional participants.

The evidence here does not support the Bar's accusations of misconduct. As the Court observed in *The Florida Bar v. Junkin*, 89 So. 2d 481 (Fla. 1956), the testimony of the complaining witness here is insufficient to establish the relevant facts with any degree of certainty. Coupled with Respondent's credible testimony, the unique facts of the case against his client, the convincing evidence provided by Respondent's credible witnesses, and the evaluation of Respondent's conduct by a highly esteemed expert criminal defense lawyer, the Referee's finding that Respondent's open and transparent use of the defense-created line-ups during the discovery deposition in a criminal case did not constitute dishonesty, deceit, misrepresentation, or fraud, and was not contrary to honesty or justice within the meaning of Rules 3-4.3 and 4-8.4(c).

B. Respondent's Conduct in Testing the Accuracy of a Potentially Mistaken Identification Comports with Florida Law.

Respondent's conduct in attempting to test the accuracy of the victim's identification was entirely consonant with longstanding Florida law as announced in *State v. Kuntsman*, 643 So. 2d 1172, 1173 (Fla. 3d DCA 1994), a decision that allows defense counsel to utilize a defense-created line-up procedure in appropriate cases when strong and compelling reasons justify its use. *See State v. McWilliams*, 817 So. 2d 1036, (Fla. 3d DCA 2002) (proper to allow defense counsel to use photo line-ups prepared by police). Strong and compelling reasons justified its use by Respondent, since significant evidence existed that the witness had misidentified the perpetrator based on an unduly suggestive police line-up procedure.

The Referee declined the Bar's invitation to convert a legitimate defense examination of a prosecution witness into a Bar violation because of a prosecutor's false and misleading complaint. The Bar, finding fault with Respondent's understanding of the law applicable to the defense use of identification techniques, attempts to hold Respondent responsible for conduct found to be allowable and proper by criminal defense expert lawyer Barry Wax and approved by the Referee. Yet, the Bar has pointed to no case or fact pattern even remotely on point. The Bar's effort to sanction defense counsel for an honest pursuit of a client's actual innocence defense is chilling to the entire defense function and the criminal justice system. This

Court should reject the Bar's invitation to make this a test case.

The Bar's parsing of words and focus on its own speculation as to what the witness must have understood are not substitutes for the actual record evidence. Jonathan Schwartz acted in full compliance with Florida law and his professional and ethical obligations to his client and to the system of justice. He did not act with a purpose to deceive. He made no misrepresentations. He provided appropriate cautionary instructions to the witness when using his defense-created photo line-ups. He learned a valuable lesson from this experience, and is now aware of the safe harbor that comes with obtaining prior judicial approval before using defense-created line-ups.

Jonathan Schwartz violated no Bar rules. The Referee found that Respondent did not act contrary to honesty and justice, and did not engage in any conduct involving dishonesty, fraud, deceit, or misrepresentation. The Bar did not prove its case by clear and convincing evidence. The Referee's findings and conclusions are supported by substantial, competent evidence. This Court should affirm the Report of Referee.

C. Respondent Is Entitled to Costs as the Prevailing Party.

Rule 3-7.6(q)(4) authorizes the assessment of Respondent's costs upon a finding "that there was no justiciable issue of either law or fact raised by the bar."

That finding is appropriate here in view of The Florida Bar's concession that it had no case or previous disciplinary matter even remotely on point involving the type of conduct challenged by the Bar. Moreover, the Report of Referee found that Respondent acted at all times in a good faith, professional manner to serve his client's constitutional guarantees within the bounds of the law and ethics.

Accordingly, the Court should remand the case only for a determination of the amount of reasonable costs to be assessed against The Florida Bar.

CONCLUSION

The report of Referee should be affirmed in its finding that Respondent engaged in no misconduct.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Times New Roman.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify the foregoing was emailed on October 3, 2018, to:

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