SUPREME COURT OF FLORIDA
(Before a Referee)
CASE NO. SC17-391
The Florida Bar File No. 2016-70,106 (11J)

THE FLORIDA BAR,
Complainant,

JONATHAN STEPHEN SCHWARTZ,
Respondent.
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REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to Rule 3-7.6 of the Rules of Discipline and in accordance with the undersigned's appointment as Referee to conduct a hearing on The Florida Bar's Complaint versus Jonathan Stephen Schwartz, as provided for by the Rules Regulating the Florida Bar, and pursuant to the Order of the Supreme Court of Florida, testimony and evidence was taken on April 4 and 18, 2018. The entire record of proceedings in this matter constitute the record and will be transmitted to the Supreme Court of Florida.

The Florida Bar and Jonathan Stephen Schwartz [Respondent or Mr. Schwartz] appeared with counsel of record at all stages of this proceeding. At the evidentiary hearing, The Florida Bar called one witness, Cristina Cabrera, who initiated the complaint with The Florida Bar, and presented documentary exhibits including a deposition transcript and exhibits used at a deposition. Respondent called

as witnesses Jonathan S. Schwartz, Barry Wax (expert witness), Jody Baker McGuire (Mr. Schwartz's associate), and Court Reporter Susan Mahmoud. The Respondent introduced the affidavits of Susan Mahmoud, Court Interpreter Don Corasmin, and Jody Baker McGuire, as well as transcripts and documentary exhibits. This Referee carefully reviewed all evidence, weighed the testimony of each witness, and considered the arguments of counsel.

II. LEGAL STANDARD

Both The Florida Bar and Respondent agree The Florida Bar must prove, by clear and convincing evidence, that Mr. Schwartz violated the rules as alleged in its Complaint. *See* Florida Standards for Imposing Lawyer Sanctions Section 1.3; *Florida Bar v. Neu*, 597 So.2d 266, 268 (Fla. 1992) ("In bar discipline proceedings, the referee must find the evidence of the lawyer's misconduct proven by clear and convincing evidence."). "'Clear and convincing' evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue." Fla. Std. J. Instr. (Civil) 405.4.[1]

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[1] And "speculation, surmise and suspicion cannot form the basis of disciplinary action against a professional license." *See Tenbroeck v. Castor*, 640 So. 2d 164, 167 (Fla. 1st DCA 1994) ("clear and convincing" evidence required to impose discipline.); *Sherburne v. School Board of Suwannee County*, 455 So. 2d 1057, 1061 (Fla. 1st DCA 1984) (evidence offering nothing "beyond supposition" insufficient to sustain disciplinary charges).

III. TESTIMONY AND EVIDENCE

This Referee makes the following findings of fact based upon the testimony and evidence presented by the parties during the evidentiary hearings. The Court carefully considered the testimony, demeanor, and credibility of the witnesses, and considered the content and context of all the exhibits.

A. Jonathan Schwartz

Jonathan Schwartz was admitted to The Florida Bar in 1986. He has practiced primarily as a criminal defense lawyer, and began his legal career as an Assistant Public Defender in Miami-Dade County. His practice also includes mental health and guardianship matters, traffic law, and limited civil litigation. He has continuously involved himself and his law firm in *pro bono* matters. During his testimony, the 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.

This Referee found Mr. Schwartz to be forthright, honest, and credible throughout every aspect of his testimony. 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. He readily understood the gravity of the proceedings, and expressed no animosity toward his accuser. He was resolute in offering detailed facts demonstrating he had no intention of engaging in any unacceptable,

inappropriate, or unprofessional conduct. His entire conduct was to conduct a legitimate and constitutionally allowable challenge to a questionable eyewitness identification, after having first brought 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.

Having carefully observed Mr. Schwartz throughout these proceedings, and evaluating the entirety of his testimony individually and in the context of the entire case, this Referee finds as a matter of fact that Mr. Schwartz was forthright and honest in his testimony and conduct. His testimony made clear to the Referee , and the Referee finds, that he acted without any purpose or intention to deceive. His conduct was not dishonest or fraudulent. He did not act in a deceitful manner. He made no misrepresentation whatsoever in the course of his conduct at issue in these proceedings. He did not fail to apprise either the prosecutor or the witness of material or relevant information.

To the contrary, this Referee finds 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.

When questioned about the line-ups by the prosecutor during an off-the-record conversation called by the prosecutor, Mr. Schwartz directly explained the

origination and purpose of the defense-created line-ups, and identified the picture of the alternate suspect in the line-ups.

His conduct and explanations corroborate 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 police photographic line-up.

In *State v. McWilliams,* 817 So. 2d 1035 (Fla. 3d DCA 2002), the court clearly 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.1, (Emphasis added).

There was no attempt by the 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 the state's black and white copy of the color photographic line-up. There is no way the witness' deposition testimony involving the sloppy black and white photocopies that Respondent used to test an alternate suspect defense (defense created line-ups using a black and white copy of "the photographic line-up" the witness had viewed) would have been useful for the defense as the prosecutor(s) seemed to fear.

Until the state attorney starts providing in pretrial discovery color copies of line-up photos, or brings the original documents to verify an identification of a defendant from the initial color photographic lineups to a witness' deposition for review by the witness, the defense attorneys can only follow *State v. McWilliams, Id* at 1037, n. 1, with the use of black and white copies as shown to the witness in this case.

Although everyone in this case should agree that substituting an alternate suspect in the state's exhibit is not the same as presenting the witness with *the photograph lineup,* the evidence is that the defense counsel in pretrial discovery were only supplied black and white photocopies of the state's two photographic line-ups, and black and white copies of those black and white copies were what was offered to the deponent to see if she recognized someone others had identified as an alternate suspect.

In an effort to "ask which photograph he or she selected" as allowed by *State v. Williams,* the Respondent used a black and white copy of the state's photographic line up and questioned the witness who initially identified Respondent's client in accordance with *State v. Williams.* He then used defense exhibits, with the alternate suspect's photo (with two different hairstyles) obviously "cut and pasted" over the circled photo of Respondent's client.

The Respondent made a messy (but clearly not deceitful) effort to comply with *State v. Williams* with only black and white copies of the state's photographic lineups that the state had given him in discovery. The Respondent left the state's copies "as is", with the date and signatures of the deponent and the detective on his defense created exhibit after telling her to "forget about what you did before." (TFB ex. 3). The circle around photo 5 remained; however, the witness herself was not confused or misled by substitution of the alternate' suspect's photo when counsel questioned her about "my exhibits."

The prosecutor could have objected to further questioning regarding the defense created exhibits, until a ruling on the matter by the judge assigned. The prosecutor chose not to after an opportunity to recess the deposition, and wisely allowed the deposition to move forward on a Friday afternoon so the criminal case could be concluded. This was the second time (due to the witness' becoming ill during the first deposition) that the witness had been scheduled for deposition.

The defense counsel are accused of "photoshopping" the state's photographic lineups which were copied in black and white and provided to the defense, but in reality, the only purpose of substituting the alternate suspect identified by that suspect's former girlfriend, a defense witness made known to the state, was to redirect the state's attention to an alternate suspect, not to create misidentification evidence in the case of *State v. Woodson.*

Although the judge assigned could have resolved these matters through hearings on the state's motion for sanctions, defense counsel has been punished by the lengthy and expensive procedures that this grievance proceeding has entailed.

The Respondent agrees that next time he has a case where there is an alternate suspect, he will clear a defense created photo exhibit involving misidentifications and alternate suspects with the prosecutor or trial judge before proceeding to depose an eye-witness.

The exhibits that the defense used, black and white photocopies of color photos, proved largely useless at the deposition.

After defense counsel 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 deponent was unable to do anything after looking at the state's exhibits that were copies of two photographic line ups in black and white, 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.)

The witness who admitted that at one time, she had been shown by an investigator "only one photo", was a candid and credible witness of the events related to the robbery. (TFB Exhibit 1, p. 28. Line 6.)

The defendant later pled to CTS and boot camp because Woodson picked up another charge by tampering with his ankle monitor violating terms of his pretrial

release) on the armed robbery with a firearm, for which a minimum 10-year state prison sentence applied.

As to Mr. Schwartz's prior discipline, it does not involve conduct that weighs on the Referee's findings of facts in this matter. His acceptance of responsibility for that prior conduct weighs favorably in support of his credibility and motivation.

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

Mr. Schwartz testified, and the documentary evidence reflects, that Mr. Schwartz comported himself professionally throughout the entirety of the subject deposition.

The witness (Gerdie Tellisma) spoke Creole and required the use of a Creole-English Court Interpreter. There was no evidence presented at the hearing that the witness spoke, understood, or read English.

Throughout the deposition, Mr. Schwartz was respectful to the witness and all participants, including the prosecutor. The transcript reflects that his office provided

a Creole interpreter for the deposition, and he made sure the witness was able to have counsel's questions and her answers fully translated and that the Creole interpreter had experience with other criminal matters.

With assistance, Mr. Schwartz prepared defense-created paper photo line-ups by taking a photocopy of the 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). Knowing the actual photo line-ups used by the police contained color photographs, Mr. Schwartz created the black and white defense line-ups solely for the purpose of determining on that day and time whether the witness could identify the known alternate suspect as the perpetrator.

As the deposition and exhibits demonstrated, the defense-created line-ups contained all the information on the original police line-ups. Mr. Schwartz did not identify, point to, or use any of that existing information when questioning the witness. To the contrary, Mr. Schwartz 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." (TFB Exhibit 1, p. 25). At this point in the deposition, the prosecutor then interrupted Mr. Schwartz's examination by

reminding the witness about the police photo lineup and asking her if the lineup "was in color or was it in black and white?" (TFB Exhibit 1, p. 26).[2]

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, Mr. Schwartz then stated 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).

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." (TFB Exhibit 1, p. 28). The witness did not identify the alternate suspect whose photograph had been cut and pasted with lines still visible on a black and white copy of the state's photographic line-up, and the witness' comment on the first picture "that looked like him" was inconsequential. The witness explained she "could not saw his face because he had the hood on his head." (TFB Exhibit 1, p. 29. Line 3). 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 witness testified that "They show me only one picture", and no attempt to follow up on her response was made by the prosecutor at the deposition. (TFB

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[2] Even though the prosecutor's interruptions appear designed on occasion to influence the witness's testimony, Mr. Schwartz responded professionally at all times as he tried to complete the deposition.

Exhibit 1, page 28, line 6). Mr. Schwartz proceeded patiently and did not create the uncomfortable atmosphere for the witness that was described by the prosecutor in her complaint.

Mr. Schwartz then presented a different version of the defense-created line-up that the Court Reporter marked as Exhibit Number Three (TFB Exhibit 1, p. 29). Before he showed the defense exhibit to the witness, the prosecutor asked for an off-the-record discussion with Mr. Schwartz. (TFB Exhibit 1, p. 29). During this break, Mr. Schwartz explained to the prosecutor that he created both defense photo line-ups, and that he inserted a photograph of the previously identified alternate suspect in place of the defendant's photograph. The Court fully credits Mr. Schwartz's testimony on this important point, especially considering that the prosecutor's testimony on this point appears to have been intentionally vague, when she claimed to not recall whether she participated in the off-the-record conference as described by defense counsel.

Once back on the record, the prosecutor objected to Mr. Schwartz's use of the defense-created line-ups in the presence of the witness and with the Court Interpreter translating into Creole. The prosecutor's objection included what the Court finds 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). After the prosecutor's intended coaching of the witness, Mr. Schwartz was able to show Exhibit Number Three to the witness. When doing so, he provided this caveat: "look at them as if you've never seen them before ..." (TFB Exhibit 1, p. 31). Mr. Schwartz explained during his testimony that his intention was to make sure the witness understood this photo line-up should not be confused with any police line-up or any photographs she had seen before. 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, Mr. Schwartz 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 particular line-up. (TFB Exhibit 1, p. 32-33).

Mr. Schwartz testified that 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. 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. He testified

that his experience with mistaken identification cases led him to understand that experienced prosecutors were open to defense presentations of actual mistaken identification cases, but that the prosecutor in this case was 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. Mr. Schwartz also testified that he 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, as Mr. Schwartz explained during his testimony, was allegedly responsible for prosecuting a factually innocent man in a different case based on highly questionable identification evidence.

Mr. Schwartz testified that he 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. Mr. Schwartz testified he 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. That legal authority, according to Mr. Schwartz, 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 Mr. Schwartz 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 Mr. Schwartz.

Mr. Schwartz testified that he was shocked to become the subject of a Motion for Sanctions filed by the prosecutor one month after the deposition had concluded. The prosecutor's sanctions motion claimed Mr. Schwartz had acted to mislead the witness at the deposition. When it became apparent that the prosecutor had expressed personal animus against him, Mr. Schwartz reassigned responsibility for the case to Jody Baker McGuire, his law firm associate who had been working on the case alongside him. Mr. Schwartz's decision to take himself out of the active defense of his client proved to be an effective one, 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 to Mr. Schwartz that she would only enter into a plea agreement calling for a lengthy prison sentence for his client, who had been a juvenile at the time of the charged crime.

As part of the plea resolution of the underlying case, Mr. Schwartz 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. Mr. Schwartz was surprised when the prosecutor filed the same misconduct claim against him with The Florida Bar. Her complaint came at a time when she was allegedly responsible for prosecuting a factually innocent defendant in another case, and was leaving the State Attorney's Office for private practice. As Mr. Schwartz explained, the prosecutor's sworn complaint contained factual accusations of Mr. Schwartz acting disrespectfully and unprofessionally during the deposition but not reflected in the transcript. Not only did Mr. Schwartz testify that he did not act improperly as the prosecutor claimed in her complaint, but the transcript of the deposition and the live testimony of the court reporter support the Respondent's version of events.

Mr. Schwartz further testified he was humbled by having to respond to the complaint that resulted in these disciplinary proceedings. It put much of his professional life on hold during the lengthy grievance process (June 24, 2015 to May, 2018). Although Mr. Schwartz did not believe he acted in any improper or unprofessional way during the deposition, Mr. Schwartz candidly offered that he would never again utilize that form of defense-created line-ups without preclearing the technique with a prosecutor. While he understood that 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 careful when pursuing subsequent misidentification challenges.

B. Jody Baker McGuire

Ms. Baker McGuire is an associate with Mr. Schwartz's law firm. She worked on the underlying criminal case with Mr. Schwartz, and took over lead responsibilities when the prosecutor began to show what she deemed personal animosity against Mr. Schwartz. Both she and Mr. Schwartz were concerned their client could not receive fair treatment by the prosecutor who appeared to dislike Mr. Schwartz. She ultimately resolved the client's three pending cases with a favorable "Boot Camp" resolution. She believed the case disposition was due to the significant likelihood that the identification of her client 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 demonstrate that the victim's police line-up identification was unconstitutionally suggestive.

Ms. McGuire testified that she worked with Mr. Schwartz to develop the defense-created exhibits. She never thought the defense exhibits were in this case misleading, deceitful, fraudulent, or a misrepresentation. She did not believe the black and white copies of copies represented a forged or fraudulent alteration of the actual police photographic line-ups. She did not observe Mr. Schwartz at the

deposition act in any manner to mislead the victim-witness. Throughout the deposition, as Ms. McGuire explained, Mr. Schwartz made a significant effort to identify the line-ups as defense exhibits that were to be looked at independently of any police line-up. Mr. Schwartz acted professionally during the deposition, and never rushed the witness or attempted to hide the line-up exhibits from the prosecutor. She noted no change in atmosphere at the deposition after the prosecutor was corrected when she attempted to interrupt the Respondent's examination of the witness.

The victim-witness did not appear to have been misled or taken advantage of by Mr. Schwartz. Nor did Ms. McGuire observe the prosecutor having trouble seeing or examining the defense-created line-ups. Ms. McGuire also confirmed that Mr. Schwartz explained to the prosecutor during an off-the-record conversation that he had created the defense line-ups from a copy of the police line-ups, and had substituted the alternate suspect's picture in place of the defendant's photograph.

When she finally worked out a resolution of the case with the prosecutor, Ms. McGuire understood the prosecutor's sanctions motion against Mr. Schwartz would be withdrawn by the prosecutor. 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.

C. Court Reporter Susan Mahmoud

Susan Mahmoud, the Court Reporter for the Tellisma deposition, testified that she observed no unprofessional conduct by Mr. Schwartz during the deposition. Mr. Schwartz was respectful to the witness, did not appear to mislead the witness, and never attempted to hide exhibits from the prosecutor. Ms. Mahmoud even explained that she marked the defense exhibits in full view of the prosecutor, and was confident the prosecutor could see and examine the exhibits before they were shown to the witness. When asked about the prosecutor's claims that Mr. Schwartz 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. As she explained, the deposition took place in the prosecutor's very small office, and all participants were situated so close to one another that it was impossible for anyone to hide exhibits from anyone else. Ms. Mahmoud never saw the prosecutor making "hand signal" objections in lieu of objecting on the record. Ms. Mahmoud also testified that the prosecutor's representation at the conclusion of the deposition that Mr. Schwartz quickly left the deposition and prevented her from asking questions was incorrect, and that the deposition ended normally. 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 Mr. Schwartz had left, to say that Mr. Schwartz had prevented the prosecutor from asking questions. The prosecutor's statement was untrue, according to Ms. Mahmoud. The Court Reporter did not have any special

relationship with Mr. Schwartz, and believed the Tellisma deposition was the first time she had reported for Mr. Schwartz.

D. Barry Wax

Barry Wax, a highly credentialed and experienced criminal defense lawyer, testified as an expert witness. This Referee finds that Mr. Wax was properly considered as an expert on matters forming the subject of his testimony. Mr. Wax provided compelling evidence that Mr. Schwartz acted consistent with Florida case law and professional obligations when using the defense-created line-ups during the deposition. Mr. Wax explained that the defense-created line-ups were not inherently misleading, and were not employed in a misleading manner. He further testified that effective criminal defense lawyers must be creative when challenging potentially mistaken victim identification. Not only would it constitute ineffective assistance of counsel for Mr. Schwartz to have not challenged the accuracy of the victim's photo identification of the defendant, but also the pretrial motion to suppress was a ready indicator that the police line-up was constitutionally suspect. The process used by Mr. Schwartz in presenting the witness with the defense-created line-ups attempted to avoid any misleading or misperception of the witness.

E. Cristina Cabrera

Cristina Cabrera, the complaining witness and former Assistant State Attorney, presented the most troubling testimony. As this Court carefully examined

her testimony and demeanor during the hearing, it became apparent that her version of the events during the Tellisma deposition was not supported by objective evidence. As an experienced prosecutor, Ms. Cabrera is well-versed in making a record of objections during a deposition. So her testimony and sworn accusations in her complaint that she used "hand signals" to inform Mr. Schwartz that she wanted him to stop or slow down or otherwise change his conduct is outweighed by more credible testimony otherwise and the witness' frank (and often unwavering) responses to Respondent's questions. Nor does this Court credit Ms. Cabrera's testimony that she was unable to see the exhibits or make objections due to Mr. Schwartz's deposition conduct. To the contrary, the Court finds that the entirety of the evidence shows that Ms. 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. Ms. Cabrera was not misled by the defense examination, and there was no likelihood the witness was misled. The Court finds Ms. Cabrera's testimony evasive, inconclusive, and did not establish the relevant facts with any degree of certainty.

This Court is 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. The prosecutor's voluntary removal of Circuit Court jurisdiction over this very same complaint

appears to have been motivated by an intention to move the complaint from one jurisdiction familiar with similar cases to a forum less likely to promptly and efficiently resolve the matter by instituting grievance proceedings that can be more lengthy and costly to an offending lawyer.

IV. THE FLORIDA BAR DID NOT PROVE ITS ALLEGATIONS BY CLEAR AND CONVINCING EVIDENCE

The Bar's Complaint against Mr. Schwartz alleges his use of the photographic line-ups during the deposition of Gerdie Tellisma constituted an act contrary to honesty and justice and/or conduct involving dishonesty, fraud, deceit, or misrepresentation. R. Regulating Fla. Bar 3-4.3, 4-8.4(c). As explained in the definitions to the 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 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.

The Florida Bar conceded it has no disciplinary case on point. Yet The Florida Bar is seeking discipline against a criminal defense lawyer who was pursuing his constitutional obligation to provide effective assistance of counsel, and doing so in a manner consistent with prevailing and accepted practices and legal authority. Having a significant understanding of the law and practice of representing defendants who may have been wrongly identified, Respondent acted reasonably and consistent with the *Kuntsman* and *McWilliams* precedent.

Despite having no precedent that would inform Mr. Schwartz of the impropriety of his defense-created line-ups, The Florida Bar seeks to hold him

responsible for his good faith efforts to effectively represent his client. Having presented no evidence of any purpose to deceive, the Bar's allegations are not well-founded.

The Florida Bar argued at the hearing that Mr. Schwartz's conduct was "deliberate and knowing," and therefore intentionally dishonest, citing *The Florida Bar v. Fredericks*, 732 So. 2d 1249 (Fla. 1999). That argument, however, 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 this case, this Court is unable to find that Mr. Schwartz made any misrepresentations at all, whether knowingly, deliberately, or negligently. To the contrary, Mr. Schwartz's representations were accurate, and his conduct did not fail to sufficiently inform the witness and the prosecutor of his presentation of the defense-created line-ups to determine whether the witness could identify the alternate suspect.

The Bar also proffered the case of *The Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002), as supportive of a case for discipline. *Forrester*, however, 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 exact opposite of Mr. Schwartz's conduct, since he never concealed any document, and made no misrepresentation concerning the creation or use of the line-ups. Although the complainant asserted that Mr. Schwartz attempted to hide the defense-created line-ups from her, the record and the credible witness testimony proves that not to be the case. This 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 testimony is in conflict with the entirety of the evidence, this Court is charged with the responsibility to assess credibility based on demeanor and other relevant considerations. *The Florida Bar v. Hayden*, 583 So. 2d 1016, 1017 (Fla. 1991).

Nor can this Court rely on *The Florida Bar v. Head*, 84 So. 3d 292 (Fla. 2012), also cited by The Florida Bar at the hearing. 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 authored 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 favoring discipline, the Supreme Court found that the "referee's findings of fact are supported by competent, substantial evidence in the record ..." *Id.* at 298.

Mr. 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. In short, Mr. Schwartz studiously avoided creating any false impression, even as he stated the truth about the defense-created line-ups.

T*he Florida Bar v. Miller*, 863 So. 2d 231 (Fla. 2003), provides a clear example of circumstances justifying a referee's finding of a lawyer's misrepresentation. 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*, Mr. Schwartz here disclosed the 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. Mr. Schwartz did not own up to the truth only when

he was caught, but affirmatively was truthful during the entire process of taking the victim's deposition.

In arguing for a finding of misconduct at the evidentiary hearing, The Florida Bar referred to *The Florida Bar v. Nunes*, 734 So. 2d 393 (Fla. 1999), a case involving a lawyer who made "inappropriate, frivolous, disparaging, and/or disrespectful remarks concerning opposing counsel," and that he "made 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 the proceedings, and falsely impugned the integrity of the judicial system. Mr. Schwartz, 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 is sufficiently inconclusive to 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 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, and the convincing

evidence provided by Respondent's credible witnesses, this Court finds and concludes 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).

V. AFFIRMATIVE DEFENSES

In further defense to each of the alleged rule violations, Mr. Schwartz asserted the affirmative defenses of compliance with his client's constitutional rights to effective assistance of counsel, to effective cross-examination, and to due process in not being the subject of misidentification. In view of the totality of the evidence and the Bar's concession that no case prohibits the defense actions taken during the course of a good faith effort to challenge the likelihood of his client's misidentification, the Court finds by clear and convincing evidence that Jonathan Schwartz acted within the bounds of the United States and Florida Constitutions, and comported himself with the letter and spirit of the Rules Regulating The Florida Bar.

VI. RECOMMENDATION

Having reviewed The Florida Bar's Complaint, Mr. Schwartz's Affirmative Defenses, having heard all of the testimony of the witnesses, having considered all of the exhibits introduced into evidence, and having heard extensive arguments of counsel, the undersigned Referee hereby finds that The Florida Bar has not proven,

by clear and convincing evidence, that Mr. Schwartz violated any Rules Regulating The Florida Bar.

VII. ASSESSMENT OF COSTS

The Referee reserves ruling on the issues of entitlement to and amount of costs to the prevailing party in accordance with Rule 3-7.6(q).

DONE and ORDERED in Miami-Dade County, Florida on May 21__, 2018.

/s/ Celeste H. Muir Celeste Hardee Muir

Celeste Hardee Muir, Referee

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