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**IN THE SUPREME COURT OF FLORIDA**
**CASE NO. SC21-484**
**FLORIDA BAR FILE NO. 2019-70,116 (11N)**

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**THE FLORIDA BAR,**
**Complainant,**

**v.**

**JONATHAN STEPHEN SCHWARTZ,**
**Respondent.**

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**ON APPEAL FROM THE REPORT OF REFEREE.**
**HON. CHIAKA N. IHEKWABA, COUNTY JUDGE/REFEREE**

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# ANSWER BRIEF AND INITIAL BRIEF ON CROSS-APPEAL OF RESPONDENT JONATHAN STEPHEN SCHWARTZ

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## SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

| | |
|---|---|
| App. | Appendix to The Florida Bar's Initial Brief |
| IB | The Florida Bar's Initial Brief |
| Record | Amended Index of Record |
| ROR1 | Preliminary Report of Referee on Liability (Oct. 11, 2021) |
| ROR2 | Amended Preliminary Report of Referee on Liability (Nov. 3, 2021) |
| ROR3 | Supplemental Report of Referee (as to Sanctions) (Feb. 7, 2022) |
| Tab | Specific Submissions in Amended Index of Record |
| Resp Ex | Respondent's trial exhibits |
| TFB Comp-Ex | Exhibits to The Florida Bar's Complaint |
| TFB Ex | The Florida Bar's trial exhibits |
| TFB-Ex-Sanctions | The Florida Bar's sanctions hearing exhibits |
| T | Transcript by trial day (e.g., T1, T2, T3 |
| TS | Sanctions hearing transcript by trial day (e.g., TS1, TS2) |
| | |

## PRELIMINARY STATEMENT

The central claim in The Florida Bar's appeal ("the Bar") is that Respondent's history of discipline over a nearly 40-year career as an active criminal defense lawyer warrants disbarment as the appropriate sanction, despite the Referee's thoughtful and detailed recommendation of a "90-day suspension from the practice of law with automatic reinstatement at the end of the period of suspension …" (Record 80; ROR3 5). This case arose from Respondent's criminal defense representation of Demarris Maloy during which he obtained an affidavit from a codefendant (Gabriel Johnson) supporting a severance of the defendants. Although the codefendant was represented by the Public Defender's Office and insisted he wanted to execute the affidavit, Respondent did not first communicate with or seek consent from the assigned Assistant Public Defender before obtaining the affidavit that he filed on the public record pursuant to the e-Filing Portal. For his communication with a represented parson, Respondent was found to have violated Rules 4-4.2(a) (communication with person represented by counsel) and 4-8.4(d) (conduct prejudicial to the administration of justice).

The Bar contends that at the time of this conduct, Respondent

was subject to pending disciplinary proceedings in Case No. SC17-1391, although Respondent had been found not guilty of those disciplinary charges (referred to as the line-up case) at the time of the affidavit preparation in this case in June 2018. It was not until November 7, 2019, that the Supreme Court disapproved the referee's findings of fact and recommendation in the line-up case and ordered a sanctions hearing. *Fla. Bar v. Schwartz*, 284 So. 3d 393, 394 (Fla. 2019).

## STATEMENT OF THE CASE AND FACTS

### A. Procedural History.

The Amended Preliminary Report of Referee (Record 63; ROR2) describes the procedural history of this case and a narrative summary of the underlying criminal case in which Respondent was defense counsel of record for Demarris Maloy. The Bar's Complaint was filed on March 30, 2021, and a final hearing as to liability was held on September 13-15, 2021. The sanctions hearing took place on December 13 and 20, 2021.

### B. Factual Summary.[1]

The Amended Preliminary Report of Referee provides a comprehensive account of the trial testimony and evidence (ROR2).

Respondent entered an appearance as defense counsel of record in *State v. Demarris Maloy* in January 2017 (ROR2 ¶1). Co-defendant, Gabriel Antwan Johnson, had been charged in the same case with sale or delivery of cocaine and was represented by the Miami-Dade County Public Defender's Office (ROR2 ¶2).

In June 2018, Mr. Maloy appeared unannounced at Respondent's office, along with co-defendant Mr. Johnson (ROR2 ¶3). Respondent was present but Mr. Johnson's lawyer was not (ROR2 ¶3). Respondent did not call the Public Defender's Office concerning Mr. Johnson's appearance at his office (ROR2 ¶4).

Respondent stated in an October 5, 2018, letter to the Bar that he advised Mr. Johnson "he could not speak with him about the case since he was represented by counsel." (ROR2 ¶5). Mr. Johnson confirmed that although he was unhappy with the Public Defender's Office, he was represented by that office and "expressed his intention

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[1] The operative facts are derived from the Amended Preliminary Report of Referee (Record 63; ROR2) and the trial testimony and exhibits.

to hire private counsel." (ROR2 ¶5). Respondent told Mr. Johnson "that he should call his lawyer before proceeding." (ROR2 ¶6).

A severance hearing in the criminal case was held on July 19, 2018. The hearing transcript was introduced as TFB Ex 2. Mr. Johnson testified at the hearing that he signed the Affidavit at Respondent's law office, no lawyer was present from the Public Defender's Office, and that at the time he met Respondent "I didn't even have a lawyer." (TFB Ex 2, p. 12). Mr. Johnson denied that the Assistant Public Defender representing him at the hearing was his lawyer: "She wasn't -- she wasn't my attorney at the time." (TFB Ex 2, p. 14; App. 58).

During the June 12, 2018 meeting in Respondent's office, Mr. Johnson told respondent he wanted to testify on behalf of Mr. Maloy (T2 165-166:15-24; ROR2 ¶13). An affidavit, commonly known as a *Byrd* Affidavit, was prepared for, and executed by Mr. Johnson. The Affidavit was notarized by Respondent's associate (T2 166-167; ROR2 ¶14). The *Byrd* Affidavit stated Mr. Johnson's willingness to testify on behalf of his co-defendant, acknowledged his own Fifth Amendment right against self-incrimination, and sought to have his own case litigated first so that his right to remain silent would be

extinguished (ROR2 ¶15). The *Byrd* Affidavit was filed with the court in Respondent's client's case through the e-Filing Portal automatically serving all counsel (T2 152-153, 174-175; T3 6-8, 9-11).

Both Mr. Maloy and Mr. Johnson secured favorable case resolutions (ROR2 ¶31), based in part on the affidavit (T2 148-150).

At the grievance trial, Respondent testified to his familiarity with Rule 4-4.2(a) restricting communications with a represented person, and believed the circumstances allowed him to obtain the generalized *Byrd* Affidavit without violating the rule (T2 146-148; T3 18). Respondent was familiar with the *Decker* precedent[2] (T2 178; T3 19-22; Respondent Ex 18) and believed he discharged his constitutional obligation to his client while at the same time proceeding cautiously in a manner consistent with Rule 4-4.2(a) (T2 147-149; ROR3 4). The affidavit did not discuss the substance of Mr. Johnson's case and caused no actual or potential to harm Mr. Johnson or his case (T2 148-149, 175; T3 25-26; ROR3 4).

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[2] *Inquiry Concerning a Judge (Decker)*, 212 So. 3d 291 (Fla. 2017).

### C. Findings of Guilt.

The Referee recommended that Respondent be found guilty of violating Rule 4-4.2(a) (Communication with a represented person) and Rule 4-8.4(d) (Conduct prejudicial to the administration of justice) by clear and convincing evidence (ROR2 10).

### D. Sanctions.

Respondent presented twenty-seven (27) mitigation witnesses at the sanctions hearing, including Circuit Judge Alberto Milian, all of whom collectively offered insightful testimony concerning Respondent's professionalism, responsible diligence in the practice of criminal defense law, his mentoring of many younger lawyers, and his outstanding reputation for representing his clients zealously and within the bounds of the standards of the legal profession. His practice involved the representation of thousands of defendants in all types of criminal cases, and he is a well-recognized and well-respected advocate in the criminal courthouse who treats opposing counsel, lawyers, judges, clients, and witnesses with respect (TS1; TS2).

The mitigation evidence included extensive documentary evidence in the form of letters of support, good works throughout the

more than thirty (30) years of his practice, and sponsoring exhibits.

Respondent acknowledged his handling of the charged case was not a model of professionalism, and that he had reflected extensively on his conduct that led him to briefly communicate with a represented person. Respondent understood that his good faith representation was misguided but was undertaken to provide effective representation to a criminal defense client in a serious criminal prosecution without doing any injury or causing potential harm to any other person. Respondent appreciated the gravity of his conduct and its incompatibility with the Florida Rules of Professional Responsibility (TS1 65-77). As he testified at trial and during the sanctions hearing, and as the Referee found, Respondent believed, imperfectly, at the time that he complied with the Florida Supreme Court precedent of *Inquiry Concerning a Judge (Decker)*, 212 So. 3d 291 (Fla. 2017) (ROR3 4). He did not intend to act in a deceptive or deceitful manner.

The Bar's evidence for sanctions consisted of Respondent's prior disciplinary cases that were considered by the Referee (ROR3 13-16).

The Referee, upon consideration of the presentations of The Florida Bar and Respondent, recommended a suspension of ninety

(90) days (concurrent with the then-recommendation of Referee/Judge Martinez) followed by a period of probation for one (1) year (ROR3 4-5). The Referee noted that a rehabilitative suspension and disbarment were not supported by the facts, Respondent's prior disciplinary cases, or the applicable legal authority (ROR3 5-6).

## STATEMENT OF THE ISSUES

1. Are the Referee's recommended sanctions reasonably based on the facts and the law and consistent with the applicable standards, all of which were carefully considered, weighed, and evaluated?

2. Are the Referee's findings as to guilt supported by clear and convincing evidence?

## STANDARD OF REVIEW

### A. Review of Issues of Law.

Issues of law are reviewed *de novo*. *The Florida Bar v. Brownstein*, 953 So. 2d 502, 510 (Fla. 2007).

### B. Review of Factual Findings.

The referee's function is to weigh and determine the sufficiency of the evidence. *Florida Bar v. Weiss*, 586 So. 2d 1051, 1053 (Fla. 1991). Review of a Report and Recommendation follows the standard

in *Fla. Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016):

> This Court's review of a referee's findings of fact is limited. If a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000); *see also Fla. Bar v. Jordan*, 705 So. 2d 1387, 1390 (Fla. 1998). Also, a referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt. *See Fla. Bar v. Shoureas*, 913 So. 2d 554, 557-58 (Fla. 2005).

*See The Florida Bar v. Martocci*, 699 So. 2d 1357 1359 (Fla. 1997) (burden to prove by clear and convincing evidence; referee's findings are presumed correct "unless clearly erroneous or lacking evidentiary support."); *The Florida Bar v. Vannier*, 498 So. 2d 896, 898 (Fla. 1986) (referee's factual findings and recommendation as to guilt are presumed correct and must be sustained "unless clearly erroneous or without support in the record."); R. Regulating Fla. Bar 3-7.7(c)(5) ("[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.").

*The Florida Bar v. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019) (emphasis added), explained the applicable standard this way:

> But as to the actual recommendations of guilt, the referee's factual findings must be sufficient under the

> applicable rules to support the recommendations. *See Fla. Bar v. Shoureas*, 913 So. 2d 554, 557-58 (Fla. 2005). Ultimately, *the party challenging the referee's findings of fact and recommendations as to guilt has the burden to demonstrate "that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." Fla. Bar v. Germain*, 957 So. 2d 613, 620 (Fla. 2007) (emphasis added).

"[A] party does not meet the burden of showing that a referee's findings are erroneous simply by pointing to contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings." *Fla. Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000) (citing *Fla. Bar v. Glick*, 693 So. 2d 550, 552 (Fla. 1997)).

**C. Review of Disciplinary Recommendations.**

On matters of discipline, the Referee's recommended sanction is subject to a broader level of review, as described in *The Florida Bar v. Altman*, 294 So. 3d 844, 847 (Fla. 2020):

> In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See The Florida Bar v. Picon*, 205 So. 3d 759, 765 (Fla. 2016) (citing *The Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989)). At the same time, this Court will generally not second-guess the referee's recommended discipline, as long as it has a reasonable basis in existing case law and the standards. *See The Florida Bar v. Alters*, 260 So. 3d

72, 83 (Fla. 2018); *The Florida Bar v. De La Torre*, 994 So. 2d 1032 (Fla. 2008).

A referee's findings on aggravation and mitigation are the equivalent of factual determinations for which the presumption of correctness applies so long as there is any supporting evidence. *The Florida Bar v. Arcia*, 848 So. 2d 296, 299 (Fla. 2003).

## SUMMARY OF THE ARGUMENT

The recommended discipline of a non-rehabilitative period of suspension followed by probation supervision for one (1) year is supported by the facts and the law and is reasonable under the circumstances of this case. The sanctions evidence provided the Referee with a measured assessment of Respondent's ability to continue providing criminal defense clients with effective representation while, at the same time, offering a meaningful framework for Respondent's adherence to the Rules of Professional Conduct. The recommendation for a non-rehabilitative suspension was an appropriate, reasonable, and measured punishment in recognition of Respondent's acceptance of responsibility, the nature of his misconduct, and his meaningful rehabilitative efforts. The Referee's recommended sanction is consistent with the Florida

Standards for Imposing Lawyer Sanctions, the relevant mitigating and aggravation factors, and case law provided by the parties. This Court should approve the recommended sanctions.

On cross-appeal, the Referee's findings that Respondent violated Rule 4-4.2(a) (Communication with a represented person) and Rule 4-8.4(d) (Conduct prejudicial to the administration of justice) are not supported by clear and convincing evidence.

## ARGUMENT

### I. THE REFEREE'S RECOMMENDED SANCTIONS ARE REASONABLY BASED ON THE FACTS AND THE LAW AND ARE CONSISTENT WITH THE APPLICABLE STANDARDS, ALL OF WHICH WERE CAREFULLY CONSIDERED (IB 33-57).

The Referee considered all aggravating and mitigating circumstances presented by the parties and gave each factor appropriate weight. The Referee ignored none of the cases cited by The Florida Bar and did not diminish the Bar's argument. To the contrary, the Referee analyzed the totality of the offense conduct, the circumstances giving rise to that conduct, Respondent's corrective action, Respondent's efforts to learn from his misconduct, the applicable precedent governing analogous lawyer misconduct, and the appropriate level of discipline to punish Respondent and act as a

warning to other lawyers on matters involving actions that by their very nature raise concerns regarding the fair and proper operation of the criminal justice system.

The Referee fully understood and embraced the purposes of discipline (ROR3 3-4) explained in *Florida Bar v. Poplack*, 599 So. 2d 116, 118 (Fla. 1992) (citing *Florida Bar v. Lord*, 433 So. 2d 983 (Fla. 1983)). These purposes include: (1) "the judgment must be fair to society . . . by protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer;" (2) the sanction "must be fair to the respondent," punishing for ethical breaches and yet encouraging reformation and rehabilitation; and (3) the sanction "must be severe enough to deter others who might be . . . tempted to become involved in like violations." *Id.*

The Referee's cautious and measured consideration of all factors presented by The Florida Bar is reasonably based on the record and should not be subjected to second-guessing by the Bar. "[T]this Court will generally not second-guess the referee's recommended discipline, as long as it has a reasonable basis in existing case law and the standards." *The Florida Bar v. Altman*, 294

So. 3d 844, 847 (Fla. 2020). The Bar's argument on appeal offers no showing of clear error in the Referee's recommendation and does not identify any arguments or authority presented during the grievance hearing that the Referee overlooked or discarded. In the absence of clear error, this Court should not stray from the Referee's recommendation. *The Florida Bar v. Altman,* 294 So. 3d at 847.

The Referee considered the applicable standards argued by The Florida Bar and Respondent. The Report and Recommendation includes the Referee's discussion of the applicable standards (ROR3 6-8). The Referee considered the Bar's argument for a rehabilitative suspension, with the Referee recommending that a non-rehabilitative suspension with a term of probation reflected the level of discipline needed in this matter. The recommendation was greater than that proposed by Respondent but less than that argued by The Florida Bar. The Referee's recommendation comprehensively compiled all the relevant facts and applicable law. The extensive record and hearing were reflected in the discussion and analysis of the applicable legal authority and precedent underscoring the rationale for the Referee's recommendation. The Referee was made aware of the 3-month suspension recommended in SC17-1391 and knew that case was

pending the Bar's appeal to the Supreme Court.

The Bar argues that no discipline other than disbarment is appropriate yet does not even discuss alternatives to disbarment such as a longer suspension concurrent with the 3-year suspension ordered in SC17-1391. *The Florida Bar v. Schwartz*, 334 So. 3d 298, 304-305 (Fla. 2022).

**A. Standard 5.1 – Failure to Maintain Personal Integrity.**

The Bar argues the Referee failed to consider and discuss Standard 5.1 in concluding that a non-rehabilitative suspension was the appropriate disciplinary sanction. Although the Referee did not find Standard 5-1 to be applicable in the absence of proof of intentional fraud or deceit on Respondent's part, application of the standard recognizes that the recommended suspension is an appropriate sanction.

> **(a) Disbarment**. Disbarment is appropriate when a lawyer:
>
> * * *
>
> (6) engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
>
> **(b) Suspension.** Suspension is appropriate when a lawyer knowingly engages in . . . other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to

practice.

Florida Standards for Imposing Lawyer Sanctions 5.1.

The Florida Bar's argument that Respondent "did not steal from a client or swindle anyone (IB 38) does not support the application of Standard 5-1 or its disbarment request. There is no record support for the Bar's argument that "no lawyer representing Mr. Johnson was going to agree to a strategy that only helped Mr. Maloy and simply created more problems for Mr. Johnson." (IB 38). To the contrary, affidavits supporting a severance pursuant to *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970), are a standard practice within criminal defense representation, and a severance of defendants was plainly consistent with the best interests of both Mr. Maloy and Mr. Johnson. Mr. Johnson's defense lawyer, Dustin Tischler, was able to benefit from respondent's filing of the affidavit to obtain a highly favorable case resolution for Mr. Johnson that consisted of only one day credit for time served (T1 100; T2 61-62; T2 53-54, 59). Mr. Tischler explained, without contradiction, that the *Byrd* Affidavit did not "hinder or harm" Mr. Johnson's case (T2 53-54). Respondent's lawyering enabled both he and Mr. Tischler to benefit from each other's representation (T2 131-132).

Nor is there any support for the Bar's argument that Respondent "values winning" above all else (IB 39). The record amply supports Respondent's professional goal to serve justice and obtain positive outcomes for his clients, including a commitment to clients that goes beyond mere case-specific resolutions (TS 14-20, 33-37). The entirety of the witness testimony established without equivocation that Respondent is not a "win at all costs" lawyer willing to bend the rules to achieve victory. With respect to Respondent's conduct in this case, the Referee understood that Respondent believed in good faith but imperfectly at the time that he was following the Florida Supreme Court's *Decker* precedent (ROR3 4). Respondent's understanding constituted a reasonable application of *Decker* considering Mr. Johnson's insistence that he wanted to testify in support of his codefendant Mr. Maloy but was not being effectively represented by the Public Defender's Office and did not even know who his assigned lawyer was.

Even if Standard 5.1 is applicable and not subsumed by the Referee's consideration of Standard 6.1 (False statements, fraud, and misrepresentation), the Referee's 90-day suspension, which would result in no additional penalty is reasonable and appropriate

considering the context of Respondent's conduct and his efforts to protect the legal interests of both his client and Mr. Johnson.

### B. Standard 6.1 – False statement, fraud, and misrepresentation.

Standard 6.1, considered by the Referee (ROR3 6), states:

> Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation:
>
> **(a) Disbarment.** Disbarment is appropriate when a lawyer:
>
> (1) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
>
> (2) improperly withholds material information and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.
>
> **(b) Suspension.** Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action.

As recognized by the Referee, Standard 6.1 supports suspension as an appropriate penalty based on deception occurring in the presentation of documents. In Respondent's situation, he filed the affidavit on the court docket, immediately upon it being signed

and explained to the presiding judge the circumstances concerning his preparation of the barebones affidavit. And Respondent believed that filing the affidavit through the e-Filing Portal automatically served all counsel of record, including the Public Defender's Office for the codefendant (T1 78-79; T2 174-175; T3 9-11). Respondent's disclosures were confirmed by Mr. Johnson, who indicated his dissatisfaction with the Public Defender's Office and his desire to obtain a severance to assist his codefendant and himself. Any potential impropriety concerning the affidavit was rectified with the judge's denial of the requested severance. Respondent's purpose in obtaining and submitting the affidavit was not to deceive, but instead was intended to further the interests of justice and a fair case resolution for his client and the codefendant.

Respondent acknowledged his misconduct and did not intend to engage in any "ends justify the means" mentality. There was neither an actual nor potential risk of injury to Mr. Johnson considering the non-substantive content of the affidavit that contained no admissions against interest or assertions that could be used against him. Nor was there any evidence adduced at trial to support the Bar's argument that "each man could achieve a better

negotiated plea by selling out the other first." (IB 41). Nothing in the record supports the Bar's contention that Mr. Johnson or Mr. Maloy had an opportunity to turn on the other or would "sell out" their best friend. At no time was Mr. Johnson's favorable negotiated plea obtained because he "flipped for the State …" (IB 42). Mr. Johnson never became a prosecution witness and never offered to do so. Defense counsel Dustin Tischler's testimony made that readily apparent (T2 49-50, 60-63).

Instead, the posture of the cases was such that Mr. Johnson's defense counsel was able to procure a favorable case resolution because of Respondent's efforts to secure a severance, thereby enabling each defendant to focus on their individual cases and not be burdened by evidence and charges pertaining to the other. The record confirmed the Maloy and Johnson case was not a traditional multiple-defendant case in which both defendants were charged with the same crimes. To the contrary, Mr. Johnson was charged with drugs found on his person, while Mr. Maloy was charged with possession of items in the residence. Respondent pursued a defense that the two were not properly joined as codefendants.

As the Referee determined, the 90-day suspension was

consistent with the suspension provision of Standard 6.1. The Referee's recommendation is not unreasonable or unsupported.

**C. Standard 7.1 – Deceptive conduct or statements and unreasonable or improper fees.**

The Referee considered and applied Standard 7.1:

> **(a) Disbarment.** Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public, or the legal system.
> **(b) Suspension.** Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Respondent acknowledged his error in presenting the affidavit in support of a severance without first confirming with Mr. Johnson's lawyer. But his actions were not for the exclusive "benefit for Mr. Maloy, causing potentially serious injury to Mr. Johnson and the legal system." (IB 41). The affidavit was beneficial to both codefendants and caused no actual or potential harm to Mr. Johnson.

Indicative of Respondent's good faith effort to seek a severance of the cases is his prompt filing of the affidavit on the court docket, setting the affidavit for a hearing, and explaining the circumstances

of his interaction with Mr. Johnson, an explanation confirmed by Mr. Johnson himself. Following that severance hearing, Mr. Johnson's newly retained defense counsel was able to benefit from Respondent's severance efforts by obtaining a favorable case resolution for his client. Based on the record and the standards, the Referee's non-rehabilitative suspension recommendation is reasonable.

### D. Standard 8.1 – Violation of court order or engaging in subsequent same or similar misconduct.

The Referee considered and applied Standard 8.1:

> **(a) Disbarment.** Disbarment is appropriate when a lawyer:
>
> * * *
>
> > (2) has been suspended for the same or similar misconduct and intentionally engages in further similar acts of misconduct.
>
> **(b) Suspension.** Suspension is appropriate when a lawyer has been publicly reprimanded for the same or similar conduct and engages in a further similar act of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Florida Standards for Imposing Lawyer Sanctions 8.1.

Respondent's prior discipline is neither the same nor similar misconduct. It does not represent a cascading path of misconduct indicative of an inability to practice with professionalism. The Respondent's prior discipline, all of which he recognized and accepted responsibility for his misconduct, is not of the same or

similar quality as the charged violations involving the *Byrd* Affidavit. Respondent's 1995 Minor Misconduct in *The Florida Bar v. Schwartz,* TFB 94-71,026 (11B), occurring more than 25 years ago, involved erroneous assertions made in connection with motions for continuances that resulted from Respondent's heavy calendar, and for which Respondent instituted corrective practices.

The matter of *The Florida Bar v. Schwartz*, Case No. SC11-2143 (TFB 2011-70,673(17A)), discussed by the Bar (IB 43), involved a consent judgment for which Respondent accepted responsibility. An improperly notarized client affidavit arose from Respondent's submission of a factually accurate financial affidavit that had not been signed in Respondent's presence when the client was out-of-the-country and acknowledged by telephone that she approved the declaration. Respondent, providing *pro bono* representation to a Venezuelan single mother whose child was fathered by an internationally famous baseball player who abandoned mother and child, did not claim the client executed the affidavit in his physical presence. Respondent affirmatively omitted any reference to the client appearing before him and inserted his initials next to his signing of her name, thereby making it clear on the face of the

document he signed the declaration in her stead. The statute at the time required an affiant's physical presence when signing, although the statute has since been amended to allow an audio-video appearance in the instance of a known person whose signature is being notarized. § 117.107(9), Fla. Stat. (2019). The Bar's use of this 90-day suspension is overstated and misplaced.

Respondent's three-year suspension in *The Florida Bar v. Schwartz*, SC17-1391, arising from his use of a defense-created photo-line-up that was misleading as a matter of law, is not indicative of engaging in repeated acts of similar misconduct. Respondent recognized the consequences of his conduct and instituted careful corrective measures to make sure that or any similar conduct never occurred again. In keeping with the suspension provision of Standard 8.1, the Referee's recommendation of a 90-day suspension is warranted.

### E. The Referee Correctly Applied the Applicable Standards, Aggravating and Mitigating Factors, and Case Law in Recommending the Suspension.

The applicable standards, aggravating and mitigating factors, and case law were considered and applied by the Referee, leading to a reasoned and fact-based recommendation of a non-rehabilitative

suspension followed by probation as the appropriate consequence for Respondent’s conduct. The Referee cautiously and carefully analyzed the applicable standards and considered all mitigating and aggravating circumstances presented by the parties and apparent in the record. The Report of Referee stated (ROR3 8):

> In considering the referenced standards, I have taken into account Respondent's misconduct and the record of proceedings in this disciplinary case. I also considered the fact that Respondent's conduct caused "little or no injury or potential injury to a client." Standard 4.3(d).
>
> This recommended discipline is based on the entirety of the evidence, including Respondent's background, and the thoughtful and revealing testimony of the witnesses, many of whom spoke of Respondent's life pattern of helping others in need both professionally and personally.

The Referee reviewed Respondent’s disciplinary history, determined which prior proceedings were significant and applicable, and considered the Bar’s argument favoring a more serious penalty because of the alleged “pattern of misconduct.” The Referee settled on the suspension recommendation best suited as punishment here. The Referee did not accept respondent’s suggestion of a lesser term of suspension, nor did the Referee find the Bar’s argument for a longer suspension to be appropriate. The Referee’s recommendation has a reasonable basis in the standards and should be approved.

### F. The Referee's Recommendation Carefully Considered and Properly Weighed the Aggravating and Mitigating Factors (IB 45-57).

The Referee found three aggravating and eight mitigating factors when deciding the recommended sanction. These factors were carefully considered and provide a reasonable basis for the Referee's recommendation.

### G. Aggravating Factors.

The Referee considered these aggravators: 3.2(b)(1) prior disciplinary offenses; 3.2(b)(3) pattern of misconduct; and 3.2(b)(9) substantial experience in the practice of law (ROR3 12-17). The Referee did not find that Respondent refused to acknowledge the wrongful nature of the conduct pursuant to Standard 3.2(b)(7), instead concluding Respondent was truly remorseful for his conduct and was entitled to the benefit of Standard 3.3(b)(12).

#### *1. Prior Disciplinary Offenses.*

The Referee evaluated each prior disciplinary offense offered by the Bar. The Referee acknowledged several of the priors involved either minor misconduct or occurred more than seven years prior. The last sanction imposed was in 2012, apart from the subsequent penalty in SC17-1391, more than seven years from the

recommendation in this case. The relevant time frame is from the imposition of discipline, and not the initiation of a grievance proceeding.

Case No. SC02-787, from 2002, occurred nearly twenty (20) years ago and involved an internal dispute with Respondent's employees after his firm disbanded. The facts of that case are entirely different from this case and the matter was resolved almost twenty years ago. The Referee gave this case no weight as an aggravating factor. It is not for the Referee or this Court to "repunish" Respondent's conduct that occurred two decades before and was appropriately punished at that time in accordance with the law and standards applicable then. This case does not warrant the increased punishment argued by the Bar.

Case No. SC11-2143, from 2012, was considered by the Referee. In that case, discussed earlier in this brief at page 24, Respondent undertook the *pro bono* representation of a Venezuelan national in a paternity proceeding. Respondent submitted improperly notarized affidavits, but never hid from the Court that he had signed for his client because of her unavailability and there was absolutely no misrepresentation within the body of this document. That case was

a highly contentious paternity suit in which the client had become pregnant by a successful professional athlete who disclaimed any responsibility for his child, and the mother's financial status was not even a factor in the case, thus making the document in question irrelevant to the litigation.

In summary, the Referee considered and evaluated Respondent's prior disciplinary history. No reason exists to alter the recommendation.

#### *2. A Pattern of Misconduct.*

The Referee considered the prior cases. The extent of Respondent's "pattern of misconduct" was weighed and considered as an aggravating factor. The Bar argues the Referee should have given greater weight to Respondent's prior misconduct, but the Referee's thoughtful evaluation was appropriate on this record and supports the recommended sanctions.

#### *3. Substantial Experience in the Practice of Law.*

Respondent is a skilled lawyer who has practiced law since 1986. Respondent affirmatively and sincerely accepted responsibility for his misconduct. Dr. Weinstein, in his capacity as Respondent's

therapist and Director of FLA, unequivocally stated Respondent was remorseful and has taken meaningful, affirmative steps to learn from his improper decisions. “Jonathan has over the years come to understand that he perhaps stepped over the line many times in an effort to advocate for his clients, but perhaps a bit too far and realizes that now as he’s practicing is very, very cognizant of his limitations.” (TS 1 17). The record reflects Respondent embarked on a meaningful path to better himself and his client representations and has taken corrective action.

#### ***4. Refusal to Acknowledge the Wrongful Nature of the Conduct.***

The Bar’s argument that Respondent refused to acknowledge the impropriety of his conduct (IB 48-50) is not supported by the record. Respondent repeatedly acknowledged his misconduct and understood that his interpretation and application of the *Decker* precedent was incorrect. Respondent might well have worn “sackcloth” (IB 49) since he made extremely clear the extent to which he has reformed his conduct and is seeking therapy to assist him in being a zealous and effective advocate while comporting himself within the strictures of the Rules of Professional Conduct.

Respondent, in the twilight of his legal career, will not repeat this or any misconduct again, a conclusion that is apparent from the Referee's recommendation and the ample and compelling evidence of Respondent's acceptance of full responsibility for his conduct, his actual remorse, and his continued corrective action daily. He has taken this breach of professionalism profoundly to heart and has worked hard to become a better lawyer and person. The Referee appropriately did not apply 3.2(b)(7) as an aggravator.

**H. Mitigating Factors.**

In mitigation, the Referee considered Standards 3.3(b)(2) absence of a dishonest or selfish motive, 3.3(b)(3) personal or emotional problems, 3.3(b)(4) timely efforts to rectify the consequences of the misconduct, 3.3(b)(5) cooperative attitude toward the proceedings, 3.3(b)(7) character and reputation, 3.3(b)(10) interim rehabilitation, 3.3(b)(11) imposition of other penalties, and 3.3(b)(12) remorse (ROR3 17-21). The record offers substantial support for each mitigator. The Bar's challenge to four of findings do not alter the significance of the Referee's recommended discipline. Overall, the mitigating facts comport with the record evidence.

***1. Absence of dishonest or selfish motive,***

***Standard 3.3(b)(2).***

The record supports the Referee's finding that Respondent's conduct was done without any selfish or dishonest motive. Respondent acted in good faith in seeking a severance t and did so in a manner causing no injury or potential harm to either defendant. The Referee correctly concluded, contrary to the Bar's argument (IB 55), that the presentation of the Byrd affidavit caused no harm and was not likely to result in any potential harm to Mr. Johnson or the justice system.

***2. Personal or emotional problems, Standard 3.3(b)(3).***

The Bar takes issue with this mitigation factor, arguing that it is inapplicable because it typically "relates to some acute emotional problem that caused a lawyer to do something out of character." (IB 53). The evidence was undisputed that Respondent has been involved in counseling and therapy supervised by Florida Lawyers Assistance (FLA) for several years and has benefitted from that therapy. Respondent is dealing with internal need to correct instances of manifest injustice. This defining value has motivated him to be especially diligent in identifying creative solutions to his cases.

Respondent's therapeutic rehabilitation program has given him significant insight into his drive to represent his clients against overwhelming odds and provided him with the decision-making skills to know when his efforts come too close to crossing the line of acceptable behavior. Dr. Weinstein testified regarding the transformation and reform of Mr. Schwartz as well as his willingness to work diligently to better channel his emotional needs (TS1 14-17). This is a mitigation factor. *See Florida Bar v. Liberman*, 43 So. 3d 36, 40 (Fla. 2010) (consideration of rehabilitation in determining whether to make disbarment effective *nunc pro tunc* to the date of emergency suspension).

***3. Timely good faith efforts to make restitution or rectify consequences of misconduct, Standard 3.3(b)(4).***

Respondent made a full and complete disclosure of the circumstances surrounding the preparation of the *Byrd* affidavit and his reason for doing so. He worked diligently to make sure that no person or the Court was disadvantaged by his use of the affidavit. This factor merited the Referee's mitigation consideration.

***4. Full and free disclosure to the Bar or cooperative attitude toward the proceedings, Standard 3.3(b)(5).***

The Referee acknowledged that even as Respondent challenged the disciplinary proceedings, he did so as a matter of legal precedent without any lack of cooperation with The Florida Bar. Respondent readily acknowledged the appearance of his actions as he tried to eliminate any possible adverse impact of his conduct.

#### ***5. Character or reputation, Standard 3.3(b)(7).***

The record evidence is undisputed that Respondent has an excellent reputation and character as a criminal defense lawyer and an involved mental health activist. The Referee recognized that Respondent provides effective assistance to clients of lesser means who are nonetheless not financially eligible for appointment of defense counsel. The Referee considered that depriving clients of the representation provided by Respondent and his firm would be disproportionate to Respondent's acknowledged misconduct. Respondent has earned a well-respected reputation as the "private Public Defender's Office" for those in need. He rarely turns away a potential client charged with serious felonies who cannot otherwise engage counsel. His representation above and beyond the obligations of cases to include mental health or environmental factors was explained by several of his character witnesses. Respondent's

extensive charitable and community contributions support a finding of good character.

Respondent routinely practiced above and beyond the assistance expected of lawyers. He provided stress reduction, meditation, and yoga services to those in need, including prisoners in the Miami-Dade County Corrections system, battered women in the Lotus House, abused children in the custody of the Department of Children and Families, and after-school programs for disadvantaged children throughout Miami-Dade County. He founded a prison yoga program that has spread from Miami-Dade County to other jurisdictions in the Florida Corrections System. Prior to his suspension last February, Respondent's firm handles dozens of *pro bono* cases, as Respondent has done every year for the past 30 years.

#### ***6. Unreasonable delay, Standard 3.3(b)(9).***

While the Referee did not find this factor in mitigation, it nonetheless should be considered in determining the reasonableness of the recommended sanction. The timing of this case resulted from unreasonable delay not caused by Respondent but that substantially prejudiced him. The Bar's delay in bringing this case was significantly adverse to Respondent when its timing suggests the Bar

held back this case to further the impression Respondent is a serial offender. All the pending matters were well-known to the Bar and did not lead to a demand for disbarment.

***7. Interim rehabilitation, Standard 3.3(b)(10).***

The Referee's finding of interim rehabilitation was undisputed at trial and was supported by substantial uncontested testimony as to Respondent's meaningful and diligent self-correction and rehabilitation efforts, especially in the years since the misconduct occurred. Respondent continues to take the initiative to improve his decision-making and his client representation. He implemented meaningful corrective protocols and systems in his practice and brought an experienced lawyer into his firm to provide him with impartial feedback concerning his creative approaches to client representation. Respondent continues to actively participate in a structured and rigorous FLA therapeutic program and has become an essential and well-respected elder statesman of the group.

***8. Imposition of other penalties or sanctions, Standard 3.3(b)(11).***

The Bar challenged this mitigation factor despite the Referee's recognition that length of time this disciplinary case has been

pending has extracted a considerable toll on Respondent. His referral to the Bar and the occurrence of disciplinary proceedings are universally known and have been talked about at the criminal courthouse, and Respondent has taken it upon himself to speak with judges to let them know he is a significantly different practitioner from the one who was the subject of the Bar disciplinary grievance. Circuit Judge Milian noted in his compelling testimony that Respondent has made a habit of helping others practice with professionalism by using his own misconduct as an example of the aggressive advocacy that can run afoul of Bar rules (TS1 104-112).

#### *9. Remorse, Standard 3.3(b)(12).*

Respondent's remorse is real and palpable, as recognized by the Referee. His remorse is shown by the evidence of significant revisions to his practice, his voluntary pursuit of FLA rehabilitation, treatment, and therapy, and his implementation of procedures to better enable him to recognize the ethical issues that arise in a criminal defense practice. He understands what it means to practice professionally.

### *10. Conclusion.*

The Referee carefully and methodically considered all the facts, testimony, and evidence in conjunction with the applicable standards to conclude that a non-rehabilitative suspension and, in this case, no additional penalty is appropriate. The Referee's conclusion has a reasonable basis that appropriately incorporates the aggravating and mitigating circumstances and should not be second-guessed where there is ample support in the record.

Especially noteworthy in mitigation was the testimony of Circuit Judge Alberto Milian (TS1 104) and Dr. Bruce Frumkin (TS1 33). Judge Milian recognized Respondent as an excellent lawyer and a passionate and effective advocate for his clients who approached his cases in a very measured manner. Respondent demonstrated a proficiency in the law, and was always well prepared, exhibiting great deal of compassion and empathy for his clients. He always showed by his actions that he gave careful attention to helping others practice responsibly and ethically.

Dr. Frumkin (TS1 33), who worked closely with Respondent for many years, knows him to be absolutely dedicated to his clients (TS1 35). Respondent routinely strives for the best in advancing his clients'

interests without concern for the clients' financial status. Respondent's involvement with *pro bono* cases has been a constant throughout his career. Respondent approaches all his cases with a sound degree of ethics and professionalism and has never given Dr. Frumkin reason to believe Respondent is capable of deceit or dishonesty.

Scott M. Weinstein, Ph.D. (TS1 14), a Florida licensed psychologist providing therapy and treatment to Respondent as recommended by FLA (Florida Lawyers Assistance), confirmed that Respondent's conduct was done in good faith with no purpose of obtaining any improper benefit for himself or others. Respondent, by his track record of affirmative actions and consistent therapeutic treatment, fully and completely accepted responsibility for his conduct.

To the same effect is the revealing testimony of Respondent's many mitigation witnesses who spoke of Respondent's life pattern of helping others in need both professionally and personally. Scott Levine (TS2 6), for instance, has known Respondent through the legal profession and in FLA therapy. Respondent is always present with help and encouragement for others, never blunting or excusing his

own failings. Doug Isenberg (TS2 18), too, cooperated with Respondent on legal matters and always found him to be "honest" and honorable. He is a man of "integrity." Ted Mastos (TS1 135), a long-established criminal defense lawyer and former judge, testified that Respondent "really cares" about his clients, and finds him to be cut from the same cloth as a zealous, ethical lawyer who maintains a professional relationship with his adversaries notwithstanding the rigor of his defense advocacy.

Janet Palacios has always been impressed with Respondent's professionalism and kindness (TS2 26). Nancy and Richard Browne (TS2 29) have been closely aligned with Respondent for many years, finding him to be well-grounded spiritually, ethically, and personally. Gloria McConnell understood Respondent took full responsibility for his misconduct (TS2 35). Lorna Castellanos valued Respondent for his advocacy for the mentally ill, often working tirelessly beyond what lawyers ordinarily know and can provide (TS2 40).

Crystal Beale (TS2 45), who worked with Respondent since her high school years, views Respondent as a meaningful mentor whose commitment to ethical behavior is evident in everything he does. Joshua Alexander (TS2 53), a former Assistant Public Defender who

moved to South Florida to practice law with Respondent, testified to being in awe of Respondent's willingness to always help others and provide meaningful insight to assist with problem solving.

These mitigation factors, taken together, underscore the propriety of the Referee's recommendation.

### I. The Referee Considered Applicable Case Law in Recommending the Non-Rehabilitative Suspension.

The Referee carefully considered the case law provided by the parties and based her decision and recommendation on the standards, the prior discipline, mitigating and aggravating factors, applicable legal authority, and the entirety of the facts and circumstances involved. The Referee summarized and analyzed the applicable cases in her Report and explained their application to this case in concluding that the Bar's request for disbarment was not supported (ROR3 8-12).

Disbarment is the most extreme sanction designed to be imposed only in cases where rehabilitation is highly improbable, and the conduct is egregious. *See Fla. Bar v. Mason*, 826 So. 2d 985, 988-989 (Fla. 2002). Neither condition is present here. The Bar concedes no similar case involving disbarment was presented to the Referee (IB

60), nor is there case law or precedent "on all fours." *See McElwain v. State*, 777 So. 2d 987, 988 (Fla. 2d DCA 2000). The Referee found the Bar's tendered cases to be distinguishable on the issue of the appropriate quantum of punishment.

The Bar offers the disbarment in *The Florida Bar v. Ratiner*, 238 So. 3d 117 (Fla. 2018), as indicative of the proper punishment needed here (IB 59), despite the substantially different history and past misconduct of Ratiner engaging in a pattern of disrespectful conduct over the years and disparaging other lawyers. Because there was no indication Ratiner was willing to follow professional ethics, removal from the practice of law was the only realistic sanction. By contrast here, Respondent's misconduct is far from that in *Ratiner*, and Respondent's efforts to improve his conduct is meaningful and has produced tangible results.

*The Florida Bar v. Walkden*, 950 So. 2d 407 (Fla. 2007), also cited by the Bar (IB 60), is inapplicable since that lawyer was disbarred after continuing to practice while suspended, having previously been held in contempt for practicing law despite his suspension. Respondent has shown no "defiance" concerning his conduct that subjected him to Bar discipline, as occurred in *The*

*Florida Bar v. Behm*, 41 So. 3d 136, 151 (Fla. 2010). Respondent has been truly repentant and is making meaningful efforts to correct his behavior. *Compare Florida Bar v. Bosecker*, 259 So. 3d 689 (Fla. 2018) (disbarment appropriate for lawyer's repeated similar misconduct, violation of previous disciplinary suspension order, and continuing to practice law while suspended). Respondent's prior discipline, all of which he recognized and for which he accepted responsibility, is not of the same or similar quality present in *Behm* or *Bosecker*.

Nor is *The Florida Bar v. Bitterman*, 33 So. 3d 686 (Fla. 2010), supportive of the Bar's request for disbarment. There, disbarment was the appropriate sanction for the lawyer's misconduct in misrepresenting her status as member in good standing of The Florida Bar; holding herself out as member of good standing while suspended, presenting her Florida Bar identification card to misrepresent her status as a lawyer to jail officials in order to gain access to a prisoner and obtain the prisoner's vehicle from impound lot, all of which caused harm to jail officials and the prisoner as a result of the lawyer's ongoing deceit, including her lengthy history of misconduct.

Respondent and the Referee were aware that this Court has put lawyers on notice that harsher sanctions for misconduct are to be expected. *See The Florida Bar v. Adler*, 126 So. 3d 244, 247 (Fla. 2013); *The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015); *The Florida Bar v. Altman*, 294 So. 3d 844, 847 (Fla. 2020). But as Justice Pariente noted in her dissenting opinion in *Florida Bar v. Kinsella*, 260 So. 3d 1046, 1052 (Fla. 2018), the Court "must keep in mind the facts and circumstances of each individual case and the purposes of Florida Bar discipline."

Respondent here owned up to his conduct, did not cause any actual or potential harm to any person, party, or the court, and did not disrupt any judicial proceedings. He recognized he should not have communicated with the witness who had received an appointment of the Public Defender's Office as counsel, despite Mr. Johnson's insistence that he was unrepresented. There is no evidence Respondent acted dishonestly or for personal gain. Respondent's many years of providing quality representation to his criminal defense clients supports the Referee's finding that the conduct here was misdirected in pursuit of Respondent's reasonable efforts to defend his client.

The Referee's recommendation on the facts and circumstances of this case is consistent with the standards and precedent.

## II. THE BAR DID NOT PROVE VIOLATIONS OF RULE 4-4.2 AND RULE 4-8.4(d) BY CLEAR AND CONVINCING EVIDENCE. (Cross-Appeal).

The Florida Bar did not prove violations of Rule 4-4.2(a) and Rule 4-8.4(d) by clear and convincing evidence. Accordingly, the Referee's findings of guilt must be vacated.

### A. Role of Referee in Reviewing the Evidence.

In challenging the evidentiary sufficiency to support the findings of rule violations, Respondent acknowledges that the Referee's function is to weigh the evidence and determine its sufficiency. *Florida Bar v. Weiss*, 586 So. 2d 1051, 1053 (Fla. 1991). But when the record evidence fails to support the Bar's allegations of misconduct as to specific rule violations, the complaint alleging such violations must be dismissed. *See Florida Bar v. Scott*, 566 So. 2d 765, 766 (Fla. 1990) (disapproving referee's finding of guilt as to rule violation because the record evidence did not support the referee's finding by clear and convincing evidence); *Florida Bar v. Quick*, 279 So. 2d 4, 7-9 (Fla. 1973) (same).

On this record, the evidence does not sustain the Bar's burden

of proving by clear and convincing evidence either of the charged Rules violations. The Bar bears the burden of proving each element by clear and convincing evidence that Respondent violated the charged rules. The standard of clear and convincing evidence is a “high” or “heavy” burden on the Bar, requiring it to show that Respondent violated the elements of each specific rule violation alleged in the complaint. *Florida Bar v. Rood*, 622 So. 2d 974, 977 (Fla. 1993); *Florida Bar v. Burke*, 578 So. 2d 1099, 1102 (Fla. 1991).

Florida courts define the term “clear and convincing evidence” as follows:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

*In re Davey*, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). The clear and convincing evidence burden must be undertaken for each element. *Grad v. Copeland*, 280 So. 2d 461 (Fla. 4th DCA 1973*); Goodwin v. Blu Murray Insurance*, 939 So. 2d 1098 (Fla. 5th DCA 2006).

Here, much of the Bar's proof is vague and accusatory, but not of sufficient weight to support a finding of guilt without hesitancy. *Dana v. Eilers*, 279 So. 2d 825 (Fla. 2d DCA 2019). Absent proof by evidence adequate to leave "no substantial doubt ... sufficient to convince ordinarily prudent minded people[,]" the proof is inadequate. *Slomowitz v. Walker*, 429 So. 2d at 799. Because the Bar's evidence is capable of several reasonable constructions, including Respondent's good faith misunderstanding of Mr. Johnson's insistence that he had no lawyer or a good faith belief his acquisition of a barebones, non-substantive affidavit did not involve the subject matter of any existing representation of Mr. Johnson, and thus does not run afoul of the communication rule. None of the evidence suggests, much less proves, that Respondent procured information from Mr. Johnson or took any action that interfered with the administration of justice. Quite the contrary, the evidence indicated that Respondent was careful to make sure that no conversation occurred regarding the facts of the case.

When the evidence is inconclusive or contradictory as to a rule violation, the Referee's finding should be in favor of the Respondent because the evidence "does not establish the charges with that degree

of certainty as should be present in order to justify a finding of guilt" as to a disciplinary rule violation. *See Florida Bar v. Rayman*, 238 So. 2d 594, 598 (Fla. 1970) (disapproving referee's findings and concluding that the inconsistent and inconclusive record evidence failed to satisfy that degree of proof necessary for finding a disciplinary rule violation). *See also Florida Bar v. D'Ambrosio*, 946 So. 2d 977, 980-981 (Fla. 2006) (disapproving referee's findings when the referee failed to "discuss differing accounts, make any credibility findings, resolve conflicts of evidence or present specific factual findings" and failed to "conduct any analysis of the facts in light of the case law.").

### B. Rule 4-4.2(a) (Communication with Represented Person).

Rule 4-4.2(a) provides

> (a) In representing a client, a lawyer must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, a lawyer may, without such prior consent, communicate with another's client to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on a person, in which event the communication is strictly restricted to that required by the court rule, statute or contract, and a copy must be provided to the person's lawyer.

The evidence does not support a finding that Respondent obtained Mr. Johnson's affidavit while "communicat[ing] about the subject of the representation." Instead, the trial evidence revealed Respondent took reasonable precautions, while providing effective representation to his client Mr. Maloy, to assure that Mr. Johnson believed he was not represented and had no counsel, and that nothing in his *Byrd* Affidavit could cause any harm to Mr. Johnson or his case. Observing Mr. Johnson's readiness to be a witness at a severed trial of his codefendant, the evidence did not clearly or convincingly show Respondent stepped over the line, misread Mr. Johnson's statements, or influenced Mr. Johnson to act on his client's behalf. Nothing in the affidavit reasonably appeared to be within the "subject matter" of the representation Mr. Johnson had or might have had, because the subject matter of his criminal case would have been in reference to his alleged possession of 11 bags of cocaine in his pocket; but this was not mentioned.

Absent proof that Respondent discussed the facts of Mr. Johnson's case with him (i.e., the "subject matter"), without conferring with Mr. Johnson's lawyer, no violation of Rule 4-4.2(a) results. Accordingly, the evidence does not support a finding of a

Rule 4-4.2(a) violation.

The totality of the evidence indicates Respondent's acquisition and presentment of the *Byrd* Affidavit came within the safe harbor provision of Rule 4-4.2(a), since the affidavit was necessary to comply with the legal requirements to obtain a severance. The communication rule allows a lawyer to

> communicate with another's client *to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on a person*, in which event the communication is strictly restricted to that required by the court rule, statute or contract, and a copy must be provided to the person's lawyer.

Respondent, to support a severance pursuant to *Byrd v Wainwright*, 428 F.2d 1017 (5th Cir. 1970), was obligated to procure an affidavit from the codefendant, the inclusion of which was essential to comply with the severance rule. As such, because Respondent did no more than secure the most minimal form of affidavit to meet the command of a severance motion, his conduct squarely satisfied the allowable limits of the communication rule. Respondent's immediate filing of the *Byrd* Affidavit was automatically served on Mr. Johnson's then-counsel of record through the e-Filing Portal. By so doing, Respondent's actions

were not contrary to Rule 4-4.2(a).

The conclusion that no violation of Rule 4-4.2(a) was proved by clear and consistent evidence is consistent with the valid exercise of a criminal defense lawyer's obligation to effectively represent a client while relying on the statements of a potentially represented witness who desires only to inform counsel of the willingness to be a witness. Mr. Johnson's insistence that he had no continuity of counsel, did not have counsel, and was intent on firing his assigned public defender because of the ever-revolving door of assigned lawyers, justifiably caused Respondent to rely on Mr. Johnson's representations that he was effectively unrepresented Mr. Johnson secured the assistance of a private lawyer within a few weeks of the affidavit and never spoke to any representative of the Public Defender's Office after leaving Respondent's office. That Mr. Johnson explained to Circuit Judge Multack at the severance hearing that he had no lawyer confirms the reasonableness of Respondent's understanding.

This conclusion precisely squares with the import of the Supreme Court's holding in *Inquiry Concerning a Judge (Decker),* 212 So. 3d 291, 306 (Fla. 2017) (emphasis added), that a lawyer

can reasonably rely on a witness' insistence to not being represented (Respondent Ex 18):

> We conclude that one of the most serious violations found by the Hearing Panel—Charge 8 relating to prohibited communication with a represented party—is not supported by the evidence. Rule of Professional Conduct 4-4.2(a) requires that an attorney not meet with a person counsel knows is represented about the subject of the representation without permission from that person's counsel. The evidence established that then-attorney Decker, along with his client, Jennifer Ellison, who is also an attorney, met with Job White to discuss possible settlement of a portion of the Compass Bank litigation. However, the evidence is uncontroverted that then-attorney Decker was directly and unequivocally informed by White that he was no longer represented by counsel of record Brent Siegel.
>
> *We conclude that then-attorney Decker did not have an obligation to confirm that White was no longer represented by counsel.* We also conclude that White's status as an unrepresented party was not dependent upon his former counsel's compliance with the requirements of Florida Rule of Judicial Administration 2.505(f)(1) regarding withdrawal of an attorney. A party who like White has decided that he no longer desires to be represented by counsel should not be chained to counsel for purposes of Rule of Professional Conduct 4-4.2(a) until counsel withdraws under Florida Rule of Judicial Administration 2.505(f)(1). And a lawyer like then-attorney Decker should not be required to further investigate the status of the representation once the party has stated unequivocally that he is not represented by counsel. *See In re Users Sys. Servs, Inc.*, 22 S.W.3d 331, 334-35 (Tex. 1999) (holding both that (a) rule of professional responsibility prohibiting

> communication by an attorney with a person represented by other counsel ordinarily "does not require an attorney to contact a person's former attorney to confirm the person's statement that representation has been terminated before communicating with the person" and that (b) "the client's right to terminate the relationship" is not "limited by the attorney's responsibilities to a court as counsel of record for the client"). We therefore disagree with the Hearing Panel's conclusion that then-attorney Decker's conduct violated Rule of Professional Conduct 4-4.2(a).

Respondent reasonably understood *Decker* as allowing a person, formerly represented, to disclaim current representation *en route* toward obtaining a new lawyer. Mr. Johnson repeatedly informed Mr. Schwartz, consistent with the entirety of the evidence, that he did not even know anyone at the Public Defender's Office and was not receiving any representation from its lawyers. Mr. Johnson intended to find another lawyer and did so relatively soon after meeting Respondent.

Because Mr. Johnson's Affidavit (Respondent's Ex 2) is profoundly significant in stating he never discussed the subject of his representation with Respondent, the undisputed evidence does not support a Rule 4-4.2(a) violation. That Affidavit is consistent with the trial evidence and the testimony before Judge Multack that

Respondent did not even speak with Mr. Johnson about any subject of his criminal case. Mr. Johnson was simply brought to the office by his best friend and codefendant Mr. Maloy, who represented that Mr. Johnson was willing to testify on his behalf. No evidence was presented that Respondent ever spoke a single word to Mr. Johnson regarding the subject of the criminal case or his representation if any, a fact evident from the entirety of the *Byrd* Affidavit that did not reference any case-specific fact. *Compare Fla. Bar v. Nunes*, 661 So. 2d 1202 (Fla. 1995) (public reprimand and 10-day suspension ordered for lawyer who intentionally wrote letter to represented person about the very foreclosure lawsuit at issue without the consent of the person's lawyer).

The evidentiary differences between Mr. Maloy's case and Mr. Johnson's charges, as explained by Respondent (T2 134, 141-142, 183-186), underscores that the subject of Mr. Johnson's case was never discussed with Respondent because his knowledge and information came from his own defense investigation and his communications with his own client, Mr. Maloy. Notably, Respondent's statements to Judge Multack did not involve the subject matter of Mr. Johnson's case, namely, anything concerning

his guilt or innocence to possessing 11 bags of cocaine that formed the acts alleged in the Information against him.

That the joint criminal case involved two separate and completely distinct fact-based charges against two defendants distinguishes the circumstances here from what might appear to be the Rule 4-4.2(a) communication prohibition involving the subject matter of the representation. Mr. Johnson's affidavit did not reference the facts of his own case, but instead concerned the fact of Mr. Maloy's separate conduct.

Rule 4-4.2(a) does not prohibit all communication with a represented person and does not extend to the limited conduct shown to have occurred. Respondent, as an experienced criminal defense lawyer, attempted to walk the fine line between representing his client in an effective manner while avoiding any potential overreaching or influencing when meeting with a potential witness who wanted to assist Respondent's own client. Respondent limited his conduct to the narrowest available in a manner consistent with the Rules of Professional Conduct, thereby meeting with a potential witness who disclaimed legal representation but not in any way interfering with the subject of that witness' criminal case.

Legal authority applying the communication rule is consistent with this analysis. *Fla. Bar v. Trinkle*, 580 So. 2d 157, 158 (Fla. 1991), involved a lawyer renegotiating the terms of a transaction with his cousin, knowing the cousin was separately represented by counsel. The transaction itself was of significant benefit to the lawyer. And there was no suggestion the cousin had discharged counsel or that the lawyer misunderstood the undisputed fact of representation. Accordingly, the finding of "overreaching" in *Trinkle* by engaging in unauthorized communication with a represented person warranted a disciplinary finding of guilt.

In *Florida Bar v. Feinberg*, 760 So. 2d 933 (Fla. 2000), the Bar filed a complaint against Feinberg, alleging he had spoken with an opposing counsel's client without opposing counsel's knowledge, and was later untruthful concerning the events. Feinberg was a prosecutor who met with a represented person when attempting to negotiate a cooperation agreement without the person's lawyer, even as he asked the potential cooperator if he wanted his lawyer present. When the potential witness declined, Feinberg even asked if the witness wanted a lawyer to be appointed. Later, the prosecutor instructed the witness to not inform his lawyer of the meeting, and

when asked by the lawyer about meeting with his client, Feinberg responded untruthfully. This was sufficient evidence to prove a Rule 4-4.2(a) communication violation as well as proof of engaging in conduct prejudicial to the administration of justice in violation of Rule 4-8.4(d).

The facts presented at trial in Respondent's case, however, do not confirm knowledge of Mr. Johnson's ongoing representation by counsel or Respondent's efforts to cover up a prohibited communication.

*The Florida Bar v. Nunes*, 661 So. 2d 1202 (Fla. 1995), is also instructive. There, the respondent lawyer violated the rules of professional conduct by communicating with a person whom he knew to be represented by sending her a copy of a letter he had sent to her lawyer that asserted the lawyer had engaged in malpractice in the handling of an underlying foreclosure action. The substantive nature of the communication and the respondent's knowledge that the person was represented were abundantly clear from the evidence, with the additional fact that the respondent submitted false evidence during the disciplinary proceeding. That misconduct violated both Rules 4-4.2(a) and 4-8.4(d) and warranted a 10-day suspension and

an 18-month term of probation.

By contrast here, Respondent was reasonably informed Mr. Johnson was unrepresented and Respondent was truthful in describing his actions. Accordingly, the Referee's finding of guilt is inconsistent with *Nunes*. Since the evidence did not show by clear and convincing evidence that Respondent violated the communication with a represented person rule, no violation of Rule 4-4.2(a) occurred. The Referee's contrary finding must be vacated.

### C. Rule 4-8.4(d) (Conduct Prejudicial to the Administration of Justice).

Rule 4-8.4(d) states:

> A lawyer shall not:
> (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic; …

Without a provable violation by clear and convincing evidence of the communication prohibition rule, the evidence did not show Respondent engaged in conduct prejudicial to the administration of justice. Instead, the entirety of the evidence is that Respondent's

actions in representing his client affirmatively furthered the administration of justice, significantly assisted Mr. Johnson, and led to the severance of their cases. That in turn resulted in favorable case conclusions, thereby avoiding unnecessary trials, and enabling both defendants to move beyond the criminal cases.

Respondent's lawyering was directed toward a reasoned and skillful defense that was of benefit to both Mr. Maloy and Mr. Johnson, did not cause harm to the interests of justice, was consistent with the best interests of both defendants, and enabled the cases to be reasonably resolved. That is entirely consistent with the administration of justice, the effective assistance of counsel, and the severance allowed by Rule 3.152 of the Florida Rules of Criminal Procedure. *Compare Fla. Bar v. Feinberg*, 760 So. 2d at 939 (prosecutor publicly reprimanded for conduct prejudicial to the administration of justice when he "continued to meet privately with a criminal defendant after he discovered that the defendant was still represented by counsel."). As *Feinberg* observed at *938, "while conduct that actually affects a given proceeding may be prejudicial to the administration of justice, conduct that prejudices our system of justice as a whole also is encompassed by rule 4-8.4(d)." *See*

*Florida Bar v. Machin*, 635 So. 2d 938, 939-40 (Fla. 1994).

Here, Respondent's good faith efforts were consistent with the interests of justice, protected all relevant interests, respected the legal rights of the participants, and brought about a fitting resolution to the criminal charges. The severance motion and affidavit advanced the interests of justice by ultimately resulting in a separation of two cases that had been arguably joined improperly.

On this record, the evidence did not clearly and convincingly prove Respondent engaged in conduct prejudicial to the administration of justice. Accordingly, the Referee's finding of guilt should be vacated.

## CONCLUSION

Respondent asks this Court to vacate the Referee's findings of guilt. Alternatively, as to the recommended discipline, Respondent asks the Court to approve the Referee's recommendation.

## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies this document complies with the font and word count requirements of Rules 9.045 and 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure. The font type is 14-point Bookman Old Style. The word count is 11,323 words as counted by

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the document has been furnished September 12, 2022, via the State of Florida's e-Filing Portal, to: Chris W. Altenbernd, service-caltenbernd@bankerlopez.com, Rita Florez, Bar Counsel, The Florida Bar, rflorez@floridabar.org; Patricia Ann Savitz, Staff Counsel, The Florida Bar, psavitz@floridabar.org; Barry Wax, barry@barrywax.com.

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