

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Case No.: SC21-484

Complainant,

The Florida Bar File
No. 2019-70, 116 (11N)

v.

JONATHAN STEPHEN SCHWARTZ,

Respondent.

**APPENDIX TO
THE FLORIDA BAR'S
REPLY BRIEF**

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

CRIMINAL DIVISION

CASE NO.: F1621853A

JUDGE SPENCER MULTACK
July 19, 2018

CRIMINAL COURT DIVISION
2018 AUG -3 AM 9:29
ADMIN OFFICE OF THE CLERK
ELEVENTH JUDICIAL CIRCUIT

STATE OF FLORIDA,
Plaintiff,

v.

DEMARRIS MALOY,
Defendant.

_____ /

The above-entitled and foregoing cause having come on to be heard before HONORABLE SPENCER MULTACK, at the Richard E. Gerstein Justice Building, 1351 Northwest 12th Street, Courtroom 2-2, Miami, State of Florida 33125, on July 19, 2018.

CERTIFIED COPY

APPEARANCES:

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P R O C E E D I N G S

1
2 BE IT REMEMBERED that the following proceedings were
3 had in the above-entitled cause before the HONORABLE
4 SPENCER MULTACK, Judge in the Circuit Court, in Miami-
5 Dade, Florida, with appearances as hereinabove noted, to-
6 wit:

7 (Thereupon, the following proceedings began at 9:19 a.m.)

8 THE COURT: The other one I have is Demarris
9 Maloy, but this early in the calendar, I'm not --
10 this should take, you know, ten, 15, 20 minutes of
11 argument. I'm not sure if we want to do it so early
12 in the calendar.

13 THE COURT: Let's wait. Let's --

14 MR. SCHWARTZ: Sure.

15 THE COURT: -- do it towards the end.

16 MR. SCHWARTZ: I'll come back in a while.

17 THE COURT: Thank you.

18 (Thereupon, other matters were heard at 9:19 a.m., after
19 which the following proceedings were had beginning at
20 10:15 a.m.):

21 THE COURT: Mr. Schwartz, are you ready?

22 MR. SCHWARTZ: I'm ready.

23 THE COURT: All right. Where's Mr. Walsh.

24 MS. MATHIS: I'm standing in temporarily.

25 THE COURT: Right, I think this is a

1 substantive motion, so I'm waiting for him.

2 MR. SCHWARTZ: This is on the motion to sever
3 based on a Byrd affidavit filed in this case, Judge,
4 State's filed a response.

5 Are we waiting for the attorney?

6 THE COURT: Yes, let's wait for Mr. Walsh.

7 We have Ms. Del Sol here from the Public
8 Defender's Office.

9 Are you joining the motion?

10 MS. DEL SOL: No, Your Honor.

11 THE CLERK: Page?

12 MR. SCHWARTZ: It's Demarris Maloy, I'm sorry.

13 THE CLERK: I've got it.

14 MS. DEL SOL: Page five, okay.

15 (Other matters heard briefly.)

16 THE COURT: Mr. Walsh.

17 MR. WALSH: Yes, Judge.

18 THE COURT: Okay, are you ready to proceed on
19 Mr. Maloy's case?

20 MR. WALSH: Yes, Your Honor.

21 THE COURT: Ms. Del Sol, are you ready?

22 MS. DEL SOL: Yes, Your Honor.

23 THE COURT: Okay. All right. So it is Mr.
24 Maloy's motion.

25 MR. SCHWARTZ: Yes, Judge.

1 THE COURT: All right. You may proceed.

2 MR. SCHWARTZ: This is more common in a
3 codefendant type of case and more familiar, I think,
4 to all parties is what happens in a kind of a Bruton
5 situation. This is sort of like the corollary to a
6 Bruton situation but we can start just by thinking
7 and analyzing it.

8 If it was a Bruton type of situation and you
9 had one defendant who allegedly had made an
10 inculpatory statement against another defendant, it
11 would be an absolute matter of constitutional right,
12 obviously, and we would all obviously agree, that if
13 the defendant gave a statement against another
14 codefendant under Bruton, it would be a severance as
15 a matter of law otherwise it would be automatically
16 reversible.

17 You can't have another defendant possibly
18 testify or a statement offered against another
19 defendant, that's obvious.

20 And Byrd, I think is equally obvious, and is
21 really the same sort of analysis, when one defendant
22 announces, as they have, in this particular case,
23 that one, that they were there -- this is a drug
24 possession case that was found in a house, not on
25 any particular person, that was found in the house.

1 The only evidence that makes it more likely to
2 be my client is the State's evidence that he
3 supposedly was seen putting something or stuffing
4 something in a certain location, and you know,
5 that's going to be a matter of credibility and --
6 but in terms of fingerprints, in terms of DNA,
7 there's nothing that exists, so it's really -- this
8 is a house that house that has many, many, many
9 people coming in and out of the house.

10 Codefendant is going to testify that this is a
11 kind of a rooming house, there's all kinds of people
12 that come there, as -- as you know, and I think that
13 everyone agrees, from the police reports and as I
14 had argued in -- in order to get the confidential
15 informant, which you denied, and is now presently up
16 on appeal in the Third District, the sales in this
17 case, inarguably, were not made to my client and/or
18 the codefendant in the case, and they were all made
19 to other people, which further buttresses both my
20 client and more particularly the codefendant's
21 testimony that the actual possessor was not my
22 client, which is what I'm concerned with.

23 But what happens moreover in this case here, is
24 that the codefendant not only will testify that
25 there's a number of people, that it could have been

1 several people that did the actual sales, he will
2 testify that the actual drugs in a subsequent trial,
3 after his Fifth Amendment rights have been
4 extinguished were his.

5 He is going to accept full responsibility and
6 claim that those drugs were his.

7 That's precisely the kind of situation, the
8 corollary --

9 THE COURT: Well, let me ask a question because
10 this is an issue.

11 MR. SCHWARTZ: Yes.

12 THE COURT: I guess my first question is, and I
13 don't want to start, you know, invading any kind of
14 attorney/client privilege, but how do you know.

15 I guess my question is, did you speak to this -
16 - did you speak to the codefendant? Does the
17 defendant's attorney know you spoke to the
18 codefendant? Did you speak to him unrepresented?

19 And so there's -- I mean, that's what I'm
20 hearing and it makes the Court concerned.

21 MR. SCHWARTZ: Sure.

22 THE COURT: As to how you came upon this
23 statement and the attorney for the codefendant is
24 here.

25 Are you aware that a statement was given to Mr.

1 Schwartz?

2 MS. DEL SOL: No, Your Honor.

3 THE COURT: You're not?

4 MS. DEL SOL: No. The only reason I even
5 learned about the Byrd affidavit in the first place
6 was because ASA Walsh told me what was going on,
7 because I was not put on notice, no one contacted my
8 office, I had no idea that my client was in his
9 office at all, and I do not how these statements
10 were obtained.

11 THE COURT: Okay. All right. I guess that's
12 concerning.

13 MR. SCHWARTZ: The fact remains, I mean, that's
14 a whole separate side issue one way or another, how
15 -- how it came to be and why the codefendant was so
16 persistent in trying to help his -- his codefendant,
17 despite having counsel, and despite being obviously
18 told that he has a right to have a counsel at every
19 stage and waiving that right and not wanting to have
20 counsel present during the creation of the Byrd
21 affidavit.

22 That's, you know, that's a question for the --
23 the codefendant, but it has nothing to do with the --
24 -- his -- the motion itself.

25 The motion is a codefendant comes in and says

1 that I'm going to take responsibility, signs an
2 affidavit, he will testify, and that's the clear
3 question.

4 If the counsel or the Court thinks that there's
5 any kind of a violation, which there wasn't in this
6 case, you know, then that's a whole separate --

7 THE COURT: I guess there's a violation --
8 well, yeah, I mean, I guess there's an issue if you
9 met with Ms. Del Sol's client without her knowledge,
10 and you spoke to an unrepresented defendant and he
11 inculpated himself to you, I think there's a
12 problem.

13 MR. WALSH: Especially given that there's no
14 attorney/client privilege between Mr. Schwartz and
15 Mr. Maloy and so at this time, the State may be
16 forced to list Mr. Schwartz as a witness given that
17 he's heard the statements of a defendant that aren't
18 subject to any type of privilege.

19 THE COURT: Right, there is no privilege
20 between you and Mr. --

21 MR. MCNEIL: Codefendant.

22 THE COURT: And codefendant.

23 MR. MCNEIL: There's also an issue of giving
24 legal advice to a codefendant.

25 MR. SCHWARTZ: Well, those are whole separate

1 questions --

2 MR. WALSH: And I do believe that the Florida
3 Rules of Professional --

4 MR. SCHWARTZ: -- I am proffering to you this
5 is what I, in good faith, believe his testimony is
6 going to be.

7 Whether it came from him, or whether it came
8 from my client or where it came from, frankly, is
9 irrelevant.

10 I have, as an attorney, as an officer of the
11 Court, a good faith belief that this is what the
12 testimony will be.

13 If you have necessity to go underneath that,
14 well, that's -- that's a whole different story, but
15 that has nothing to do with the Byrd affidavit, and
16 the motion to sever.

17 MS. DEL SOL: Your Honor, it has everything to
18 do with the Byrd Affidavit and motion to sever,
19 because the motion to sever is based on the Byrd
20 affidavit, that was obtained without counsel's
21 knowledge.

22 MR. WALSH: And Your Honor, I would
23 specifically inquire of Mr. Schwartz, did you speak
24 with Mr. Johnson? There is no attorney/client
25 privilege.

1 MR. SCHWARTZ: Judge, here, I'm not the one
2 who's on the stand right now, and --

3 THE COURT: Well, no, I mean, you have filed an
4 affidavit with the Court of a defendant who is
5 represented by another lawyer; where is the Byrd
6 affidavit? I -- I don't have it up here.

7 MR. WALSH: Your Honor, I have a copy and it's
8 notarized by a member of his firm.

9 THE COURT: All right. And so I have an
10 affidavit, I am prepared to offer testimony on
11 behalf of codefendant Demarris Maloy. At this time,
12 I have a Fifth Amendment right against self-
13 incrimination, as I'm seeking to have my case
14 litigated first thereby extinguishing my right to
15 remain silent and then after, I will testify on
16 behalf of Mr. Maloy.

17 And so I guess, is Mr. Johnson here?

18 MS. DEL SOL: Yes, he is.

19 THE COURT: Bring him up.

20 How are you, sir?

21 DEFENDANT JOHNSON: Doing all right.

22 THE COURT: Raise your right hand for me.

23 Do you swear or affirm the testimony you're
24 about to give is the truth, the whole truth, nothing
25 but the truth?

1 DEFENDANT JOHNSON: Yes, sir.

2 COURT REPORTER: State, is he close to a
3 microphone, I'm sorry.

4 MR. WALSH: You need to step forward to a
5 microphone.

6 DEFENDANT JOHNSON: Yes, sir.

7 THE COURT: All right. I guess my question to
8 you is did you speak to your lawyer, Ms. Del Sol,
9 about what became known to you as a Byrd affidavit?

10 DEFENDANT JOHNSON: At the time, she wasn't my
11 lawyer; I didn't even have a lawyer.

12 I -- it was another attorney that was on my
13 case, and then they switched it to her.

14 THE COURT: Right, but you were represented by
15 the Public Defender's Office, correct?

16 DEFENDANT JOHNSON: Yes, sir.

17 THE COURT: Okay. Did you meet with Mr.
18 Schwartz?

19 DEFENDANT JOHNSON: Yes, sir.

20 THE COURT: So you met with Mr. Schwartz?

21 DEFENDANT JOHNSON: Yes, sir.

22 THE COURT: When you met with Mr. Schwartz, was
23 your lawyer present?

24 DEFENDANT JOHNSON: No, sir.

25 THE COURT: Okay. And how did -- how did the

1 meeting between you and Mr. Schwartz take place?
2 Don't tell me what was said, but how did that
3 meeting come to be?

4 DEFENDANT JOHNSON: Like how did it come upon?

5 THE COURT: Yeah, like how did that meeting
6 come -- come to be?

7 DEFENDANT JOHNSON: Just me and the
8 codefendant, we came up with the idea, it wasn't
9 nothing that I was forced --

10 THE COURT: Right.

11 DEFENDANT JOHNSON: It wasn't nothing that he
12 had to do with it, it was me and my codefendant.

13 THE COURT: So you and Mr. Maloy came up --
14 came up with the idea to go to Mr. Schwartz and to
15 say hey, the drugs are mine, not Mr. Maloy's?

16 DEFENDANT JOHNSON: Yes, sir.

17 THE COURT: Okay. Is that the truth or that's
18 what you and Mr. Maloy --

19 DEFENDANT JOHNSON: Yes, sir.

20 THE COURT: Actually, don't answer that
21 question.

22 MR. SCHWARTZ: And --

23 THE COURT: Yeah.

24 MR. SCHWARTZ: I can proffer, Judge, I did tell
25 him, you know, you have an absolutely right to have

1 an attorney here, and you, you know, and I would
2 recommend that you call your attorney here; your
3 attorney is entitled to know about this and -- and
4 you know, you have a right to call your attorney and
5 frankly your attorney should be here, and --

6 DEFENDANT JOHNSON: She wasn't -- she wasn't my
7 attorney at the time.

8 THE COURT: But you -- but you had an attorney,
9 right?

10 DEFENDANT JOHNSON: Yes.

11 THE COURT: From the Public Defender's Office?

12 DEFENDANT JOHNSON: Yes, sir.

13 THE COURT: All right. And so what was the
14 conversation in Mr. Schwartz's office?

15 MS. DEL SOL: Judge, I would just ask that he
16 not saying anything regarding the facts of the case.

17 Your Honor, if we could go sidebar for a
18 moment?

19 THE COURT: Please.

20 On the record.

21 (Sidebar had.)

22 MS. DEL SOL: Your Honor, my concern is that
23 the way my client was answering these questions --

24 THE COURT: Yep.

25 MS. DEL SOL: -- is that the codefendant is

1 present, the codefendant is his friend --

2 THE COURT: Right.

3 MS. DEL SOL: -- and so when I have a
4 conversation with my client, with any -- with no one
5 around, the conversation is completely different
6 then the way he's answering out his questions today
7 --

8 THE COURT: Right.

9 MS. DEL SOL: So I feel like there's some sort
10 of coercion with regards to how he's answering Your
11 Honor's questions, and how he's addressing the
12 Court.

13 THE COURT: Okay.

14 MS. DEL SOL: And I just wanted to put Your
15 Honor on notice.

16 THE COURT: All right. Okay.

17 (Sidebar concluded.)

18 THE COURT: Here's this.

19 MR. WALSH: And Your Honor, I'm specifically
20 going to read into the record, the Florida Rules of
21 Professional Conduct specifically Rule 4-4.2,
22 communication with person represented by counsel; in
23 representing a client, a lawyer must not communicate
24 about the subject, the representation, with the
25 person the lawyer knows to be represented by another

1 lawyer in the matter.

2 THE COURT: Okay. All right, he can have a
3 seat.

4 All right. Anything else, Mr. Schwartz, with
5 regards to the substance of the --

6 MR. SCHWARTZ: The cases that they cite, Judge
7 --

8 THE COURT: Yeah.

9 MR. SCHWARTZ: -- do not involve -- the one
10 case that they cite from the Third District case,
11 Daniels versus State, there was no sufficient
12 proffer, there was no actual proffer.

13 There's no case that they've cited, I think
14 that addressed the kind of situation that we have
15 today, where there's a clear expression by a
16 codefendant on the record today, that they want to
17 take full responsibility and that's absolutely
18 relevant --

19 THE COURT: Right.

20 MR. SCHWARTZ: -- and Mr. Maloy is entitled to
21 that testimony in the subsequent trial.

22 That's exactly what was envisioned by the
23 federal court in Byrd.

24 THE COURT: Okay. State?

25 MR. WALSH: Yes, Your Honor, the affidavit

1 provided, which is the only sworn testimony, we
2 have the representations of an attorney, has already
3 been determined to have violated --

4 MR. SCHWARTZ: The defendant just testified on
5 the record.

6 MR. WALSH: The only affidavit --

7 MR. SCHWARTZ: He just testified.

8 MR. WALSH: May I -- may I finish, please?

9 The only affidavit we have by the defendant is
10 one that says he has exculpatory testimony and he
11 wants to testify once his -- once his Fifth
12 Amendment rights are extinguished.

13 I provided a number of cases stating how that
14 exactly assert -- how that exact assertion is
15 insufficient, that it's a very general statement of
16 I have exculpatory testimony.

17 There's no sworn statement saying that he has
18 the drugs, Your Honor prohibited from actually
19 answering that question that he is going to provide
20 specific exculpatory testimony for Mr. Johnson and
21 to do that, I would refer to United States v.
22 DeSimone, which is a Fifth Circuit decision back
23 when the 11th Circuit was split from 1981.

24 In that case, the affidavit provided that I,
25 David Butler, am a defendant in the above styled

1 case, that I possess testimonial evidence which is
2 exculpatory in nature to each of the other
3 codefendants. Each of the other codefendants
4 possess testimonial evidence which is exculpatory in
5 nature to me. I would testify on behalf of those
6 codefendants that I not -- that I did not conspire
7 with them, nor they with myself, as charged in the
8 indictment, that I would testify on behalf of the
9 codefendants that neither I nor -- or the
10 codefendants possessed marijuana in the manner
11 described in the indictment.

12 And it goes on to describe the number of things
13 that are more detailed than the current affidavit
14 that's before the Court.

15 The affidavit is general bare bones. It
16 repeats the language of the statute, and the case
17 cited by defense is primarily Byrd v. Wainwright,
18 and I have a copy of that case for Your Honor and
19 for counsel, and I would encourage Your Honor to
20 read it to show the extreme circumstances that must
21 be met to sort of detail when severance in a
22 situation such as this is required.

23 In Byrd v. Wainwright, there were a number of
24 confessions that had been elicited.

25 This was a multiple codefendant, I believe it

1 was a rape case, where this defendant along with
2 six other defendants and many of the -- the other
3 defendants confessed, and some of them in their
4 confession specifically said that this defendant was
5 not involved.

6 Those confessions were subsequently suppressed
7 due to Miranda and so the defendant in this case,
8 Byrd, was dealt with the situation where if you were
9 tried with the defendants, he couldn't introduce
10 those confessions because they were obtained in
11 violation of Miranda, while if he were tried in his
12 own separate trial, he would be able to introduce
13 them as an exception to hearsay, as a statement
14 against the party opponent.

15 Additionally, in that situation, many of the
16 codefendants came on record and said that they were
17 likely to plea, that the defense counsel and the
18 prosecutor agreed that they were likely to plea
19 before the trial were to occur, which would then
20 render them able to testify and testify consistently
21 with the specified details within their post-Miranda
22 confession or within their violated Miranda
23 confession.

24 And in that situation, once again, they
25 provided specific evidence as to how this defendant

1 wasn't involved and there was reliability to their
2 statements because their statements were also
3 inculpatory.

4 Here we have just his affidavit, that provides
5 no inculpatory information, so it's reliability
6 should be questioned as well.

7 This is a situation where a defendant -- where
8 the codefendant is asking for the defendant to be
9 tried first, to essentially render it where if he's
10 found not guilty, he could then accept all
11 responsibility and if he's found guilty, he can
12 accept all responsibility without running any risk
13 of him having to do that beforehand, which would be
14 required in this situation.

15 We don't live in a world where these
16 codefendants can simply do something like that, or
17 else every individual who is charged with any type
18 of conspiracy case, would ask to be tried first on
19 the off chance that they may be then able to
20 exculpate their friends at a later date, should they
21 be tried first.

22 There's not a sufficient enough basis. There
23 is no reliability to the affidavit provided. It was
24 obtained in extremely dubious means and their motion
25 should be denied.

1 THE COURT: Ms. Del Sol, do you want to add
2 anything in?

3 MS. DEL SOL: Yes, Your Honor, just going off
4 of what the State just said, these alleged
5 statements --

6 THE COURT: I'm sorry, Mr. Lavey --

7 MR. LAVEY: Yes, Judge?

8 THE COURT: I'm --

9 MR. LAVEY: Oh, I apologize.

10 THE COURT: Okay.

11 MS. DEL SOL: These alleged statements that
12 were made by my client are coming from counsel who
13 had a conversation outside of my presence while I
14 was available and could have been -- he could have
15 reached out to me, I didn't receive any notice of
16 this.

17 In addition to that, any of the testimony that
18 my client gave today had nothing to do with the
19 facts of the case, nor that he was incriminating
20 himself in any way, nor that it had anything to do
21 with the conversation that he and counsel had.

22 So to my knowledge, I don't know what they
23 spoke about.

24 I don't know if my client ever actually made
25 these statements in the first place.

1 So I'm asking that the motion be denied, and
2 that the Byrd affidavit be stricken.

3 THE COURT: I still don't know what the
4 statements are.

5 MR. SCHWARTZ: Well, he testified, so you asked
6 him the question, are you going to say that these
7 drugs are yours, he said yes --

8 THE COURT: And then I --

9 MR. SCHWARTZ: -- and then he said yes on the
10 record, and then you asked him is that true, and he
11 said yes.

12 So that's the clearest frankly I've -- I've
13 ever heard. I had understood and I -- we put in the
14 affidavit that he said he wanted to testify for my
15 client, that he was -- he was going to testify
16 favorably to the client, but today, you have him in
17 under sworn testimony, on the record, saying I'm
18 going to testify that the drugs are mine.

19 I, you know, as I said before in all of my
20 previous motions, I think that the facts as to who,
21 you know, bought what, when, where, what is all
22 important and --

23 THE COURT: Right, well, I mean, I --

24 MR. SCHWARTZ: And the comings and goings of
25 the house, I thought are important enough to render

1 his testimony relevant to us, but today, the Court
2 has elicited from him an actual confession to the
3 crime without Miranda, but with on the record, you
4 solicited testimony from him whether he was guilty
5 of the crime.

6 He testified that he was, and that the drugs
7 were his, and --

8 THE COURT: Well --

9 MR. SCHWARTZ: -- particularly now, that that's
10 the sworn testimony on the record, I should be able
11 to use his testimony.

12 THE COURT: Well, I --

13 MR. SCHWARTZ: That -- that's his desire.

14 THE COURT: Well, I -- I prevented him and told
15 him not to answer the question. I didn't hear him
16 answer the question.

17 MR. SCHWARTZ: You want to read back the
18 record, you want to hear the record back, Judge, he
19 confessed to the crime pursuant to your questioning.

20 Are you going to say that the drugs were --
21 yes; is that in fact true testimony, yes.

22 THE COURT: Well, even if he did, I'll tell you
23 that I don't think that you can use that as
24 substantive evidence.

25 MR. SCHWARTZ: I'm not going to use it, but the

1 fact that he said it, is I can use it as part of
2 my proffer at this point right now, so if they're
3 going to complain that there's a problem with the
4 affidavit, first of all, no Byrd affidavit requests
5 a defendant to confess to the crime, otherwise, that
6 could be used against him.

7 That's not the nature of a Byrd affidavit in
8 general.

9 Byrd affidavits are more in line with what I
10 wrote, which is more of a vague declaration by the
11 codefendant, I'm going to testify for the defendant
12 and I'm going to test- -- and what I'm going to say
13 will exculpate the defendant. That's the nature of
14 the Byrd affidavit.

15 THE COURT: So, you know, but if that's the
16 case, I don't understand why severance is required.

17 If he is going to testify --

18 MR. SCHWARTZ: In a separate -- only in a
19 separate trial.

20 MR. WALSH: And Your Honor, I would turn
21 specifically --

22 MR. SCHWARTZ: And he's not going to exculpate
23 -- inculcate himself in his own trial, he's got a
24 Fifth Amendment right --

25 THE COURT: Well, you haven't told me --

1 MR. SCHWARTZ: -- and that's precisely why I
2 would never, in a Byrd affidavit, put a confession
3 in it, nor is it required, for that very reason,
4 because he has the Fifth Amendment right, that's the
5 whole nature of Byrd.

6 MR. WALSH: And Your Honor, it is required.
7 Every single case I cited, it stated that it's more
8 than a general exculpation, that it has to be
9 specific that State's concerned the testimony --

10 MR. SCHWARTZ: Show me one case that says that,
11 that's just not true. That's -- that's false.

12 MS. DEL SOL: It's the rules for severing.

13 MR. WALSH: Your Honor, I'd ask the counsel to
14 stop interrupting when I'm speaking, I don't
15 interrupt him when he's speaking and this is getting
16 extremely --

17 THE COURT: Okay.

18 MR. WALSH: -- unprofessional from someone who
19 has been a member of the Bar as long as he has.

20 THE COURT: One at a time.

21 MR. WALSH: In Novatin (Phonetic), the Court
22 denied the severance, providing an example of one of
23 the conclusory statements where the defendant stated
24 he would testify the defendant did not conspire with
25 me or to my knowledge with anyone else to possess

1 with intent distribute cocaine, as alleged in
2 Count One of the superseding indictment.

3 They said that -- that statements concerning
4 the testimony that would become available by
5 severing trials, must be -- must be specific and
6 exonerative, rather than conclusory or self-sorting
7 -- self-serving in order to justify severance.

8 Again, in United States v. Pepe, which is an
9 11th Circuit decision, after the Byrd, they upheld
10 the district court's decision to deny severance,
11 where the bulk of the codefendant's proffer was
12 exculpatory to them, but neutral to the defendant.

13 With regard to the defendant that tendered the
14 testimony is that to their knowledge, the defendant
15 did not do or was not involved in certain things.

16 This tends to be equivocal with regard to the
17 wide range of activities and in no way negates the
18 act of racketeering.

19 The 11th Circuit also stated that this proffer
20 consisted almost exclusively of bare exculpatory
21 denials devoid of any specific exonerative facts,
22 and the proffer had not contravened his own penal
23 interest and it was completely self-serving and thus
24 lacked strong credibility.

25 In United States v. DeSimone, which I cited and

1 I provided the entire proffer, which is
2 extensively more detailed than the affidavit
3 provided, they denied severance, saying that because
4 the purportedly exonerating testimony proffered by
5 the codefendant did not contravene his own penal
6 interest, but instead was extremely self-serving, it
7 lacked a certain amount of credibility and that it
8 was bare bones, that it provided no specific
9 exonerative facts.

10 The Daniels court applied the same principle in
11 the Third DCA, and then additionally in the second
12 part of my motion, the case law is clear, that the
13 fourth requirement of the Byrd situation, the first
14 three requirements being that there be a bona fide
15 need for the testimony, that the substance of the
16 testimony -- that they must show the substance of
17 the testimony and they must show it's exculpatory
18 nature and effect, and that the codefendant will in
19 fact testify the cases are severing.

20 And United States v. Cobb, and I quote, the
21 fourth requirement is not met where the codefendant
22 conditions his testimony on the order of the
23 codefendant's severed trials.

24 So simply requesting that he be first does not
25 meet the fourth requirement.

1 He's failed to meet any of the requirements,
2 he's failed to provide any specific facts.

3 He's failed to provide a bona fide need for the
4 testimony because it's devoid of any specific facts,
5 and he's failed to provide the substance of the
6 testimony.

7 It simply says in his motion a verbatim repeat
8 of the statute.

9 Mr. Maloy needs Mr. Johnson's testimony in
10 order to present a full and complete offense.

11 Mr. Johnson would testify to his knowledge of
12 the parties and what happened on the date, which is
13 as specific as it gets, and then it quotes the --
14 the exculpatory nature and effect third decision
15 when it says Mr. Johnson's testimony is exculpatory
16 to Mr. Maloy both in nature and effect, which is a
17 verbatim quote of the statute, just putting in the
18 defendants names.

19 This is as bare bones as it gets, and the
20 courts have consistently held that bare bones is not
21 enough.

22 That the Byrd situation is an extreme example;
23 you have prior confessions which were specific in
24 nature, you have the fact the defendants admitted
25 that they were going plea before the case actually

1 went to trial, and they specifically said he was
2 not involved in this rape, we were involved in this
3 rape and he had nothing to do with it.

4 And all this evidence was unavailable to the
5 defendant if he were to be tried separately.

6 Defense counsel has failed to present any
7 specific evidence that would be unavailable to him
8 if they were to be tried separately. The condition
9 and the requirement that his case be tried first,
10 does not meet the fourth requirement, as such he has
11 failed to justify severance under Byrd and that
12 doesn't even begin to address the credibility due to
13 the nature by which Mr. Schwartz obtained these
14 statements.

15 THE COURT: Okay. Understood.

16 MR. SCHWARTZ: Can I ask Mr. Johnson just three
17 more questions, Judge, can we have him be brought up
18 here just for a moment, because his lawyer is
19 arguing something that -- that's not what Mr.
20 Johnson actually -- I don't know what the lawyer is
21 arguing for him, Judge, but it's not what Mr.
22 Johnson's wants.

23 THE COURT: Well, I think that's the problem.

24 I mean --

25 MR. SCHWARTZ: I understand what they're

1 arguing or why they're arguing on behalf of the
2 State Attorney's Office, Judge, when it's -- I don't
3 believe it's what their client wants or in their
4 client's best interest.

5 THE COURT: Well --

6 MR. SCHWARTZ: Can we talk to Mr. Johnson?

7 MR. WALSH: Your Honor, he doesn't control Mr.
8 Johnson --

9 THE COURT: Hold on, stop, stop.

10 The Court is concerned obviously, that Mr.
11 Schwartz, you've been having some kind of
12 communication with a represented defendant, that of
13 one by the Public Defender's Office.

14 And so I don't know what you know what he
15 wants, it's up to Ms. Sol, and to Mr. Johnson to
16 decide what he wants, what he wants to do.

17 MR. SCHWARTZ: Well, he signed an affidavit
18 saying what he wants to do.

19 Has he changed his mind; I'll -- let him say
20 that on the record. Has he changed his mind saying
21 he doesn't want a severance, is he saying that
22 somehow he doesn't want go forward --

23 THE COURT: Right, but -- but --

24 MR. SCHWARTZ: -- and saying he doesn't want to
25 testify --

1 THE COURT: But the fact --

2 MR. SCHWARTZ: -- the defendant --

3 THE COURT: Hold on, stop, because you
4 requesting a severance for a represented defendant,
5 I mean, I'm not sure how far that goes.

6 You're not his lawyer, he told you that, I
7 guess, I don't know, in some conversation where his
8 lawyer wasn't present.

9 The affidavit, I agree, is questionable. I
10 believe the affidavit is bare bones. I'm going to
11 deny the motion for severance.

12 MS. DEL SOL: And Your Honor, we're just
13 requesting Your Honor to instruct counsel not to
14 speak to my client without my consent.

15 THE COURT: Okay. I mean, I would think Mr.
16 Schwartz would know not to speak to clients who are
17 represented.

18 MR. WALSH: And Your Honor, at this time, the
19 State would be requesting a Stay Away Order from the
20 codefendants so they can no longer communicate.
21 This is clearly becoming an issue.

22 It's proper for the Court to issue a Stay Away
23 Order for people who commit crimes together; there
24 is a situation where they have been alleged to
25 commit crimes together, the State does intend on

1 trying them together and this will prevent further
2 conduct such as this that is occurring.

3 THE COURT: Okay. Mr. Maloy has a problem with
4 that.

5 DEFENDANT MALOY: Yeah.

6 THE COURT: Okay.

7 I'm not sure what that would do, because it
8 seems like whatever damage is done is done, they
9 appeared, and according to Mr. Johnson, discussed
10 the case, and then went to Mr. Schwartz's office.

11 I mean, that's -- that's what the testimony
12 was, is that they discussed the case and went to Mr.
13 Schwartz, so I don't know what happened, but that's
14 what Mr. Johnson said.

15 MR. WALSH: And Your Honor, the Court is fully
16 within its purview to issue a Stay Away Order
17 preventing the codefendants from having contact with
18 each other during the pendency of the trial, and I
19 believe that this is a situation where the Court
20 most certainly should. It's done at least almost as
21 a matter writing juvenile courts, which is what I've
22 seen it most heavily done.

23 I haven't had a situation very often where I've
24 filed and believed it to be necessary in adult
25 court, but I do believe it necessary here, so I'm

1 going to --

2 MR. SCHWARTZ: What possible reason at this
3 point, what possible reason, they've been good
4 friends for a while evidently, they're obviously
5 having some communication with each other, what
6 possible reason. Like the Court said, whatever
7 communication has occurred, evidently, Mr. Johnson
8 wants to tell the truth and to take responsibility
9 for the case.

10 Whether this --

11 THE COURT: According -- according to you, and
12 you're not his lawyer.

13 MR. SCHWARTZ: According to what my
14 investigation shows.

15 THE COURT: Okay.

16 MR. SCHWARTZ: As I said, I'm not representing
17 that he said anything to me frankly, Judge, but the
18 fact of the matter is, that's what I understand his
19 testimony could be.

20 THE COURT: All right, I'm not going to issue a
21 Stay Away Order at this point.

22 MR. SCHWARTZ: All right.

23 THE COURT: Here, if you could -- Michelina,
24 pass me blank order.

25 MR. SCHWARTZ: What's our trial status, Judge?

1 THE COURT: I guess it's after you get your
2 ruling back from the Third DCA.

3 MR. SCHWARTZ: Right, I'll file -- get a
4 transcript on this, we'll file a notice within 30
5 days or just add this one to the same appeal and --

6 THE COURT: Okay.

7 MR. SCHWARTZ: You want to put report date for
8 August 3rd?

9 THE COURT: Sure. What's --

10 CALENDAR CLERK: Your Honor, 8/20 is the trial
11 date.

12 THE COURT: What's our next date for Maloy?

13 CALENDAR CLERK: It's 8/20.

14 THE COURT: For sounding or trial?

15 CALENDAR CLERK: No, that's a trial date,
16 Judge.

17 THE COURT: Do you want a status date before
18 that?

19 MR. SCHWARTZ: I'm sure nothing's going to
20 happen much before then, so if we could just have it
21 as a report date.

22 MR. WALSH: Your Honor, I'd ask that we keep
23 the trial date, the fact that an appellate motion is
24 pending to irrelevant to whether we can proceed
25 forward on the case.

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THE COURT: Let's just status on Friday,
August 3rd.

MR. SCHWARTZ: Okay. As you know, Judge, we
have filed a notice of appeal in the Third, and I
don't even think we're going to have transcripts
ready to go by then let alone briefs, but okay.

THE COURT: Okay. Here we go.
Thank you.

(Thereupon, the proceedings were concluded at 10:46 a.m.)

CERTIFICATE OF TRANSCRIPTION

The above and foregoing transcript is a true and correct
typed copy of the contents of the file, which was
digitally recorded in the proceeding identified at the
beginning of the transcript, to the best of my ability,
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Roxanne Fitzgibbon, Transcriber
August 1, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing was this date filed and served by using the Florida Courts e-Filing Portal on this 14th day of October, 2022 to:

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