

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
INITIAL BRIEF**

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No. 2019-70,116 (11N)

JONATHAN STEPHEN
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AMENDED PRELIMINARY REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On March 30, 2021, The Florida Bar filed its Complaint and Request for Admissions in these proceedings. A final hearing was held as to the guilt phase on September 13-15, 2021. All items properly filed including pleadings, recorded testimony (transcribed), exhibits in evidence, and the report of referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

In these proceedings, the following attorneys appeared as counsel for the parties:

For The Florida Bar: Rita Florez
Arlene Kalish Sankel

For the Respondent: Benedict P. Kuehne
Barry Wax

In these proceedings, the following witnesses testified at trial:

Witness Name	Fact/Expert Testimony	Called by
Kristine del Sol, Esq.	Fact	The Florida Bar
Daniel Walsh, Esq.	Fact	The Florida Bar
Dustin Tischler, Esq.	Fact	Respondent
Juan de Jesus Gonzalez, Esq.	Expert	Respondent
Jonathan Schwartz, Esq.	Fact	Respondent

II. FINDINGS OF FACT

Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

Narrative Summary Of Case.

1. On or about January 17, 2017, respondent filed a Notice of Appearance on behalf of the defendant in *State v. Demarris Maloy*, Case

No. F16-21853A, in Miami-Dade County Circuit Court. (See Respondent's Ex. 6).

2. A co-defendant, Gabriel Antwan Johnson, had been charged in the same Information with sale or delivery of cocaine, Case No. F16-21853B. Mr. Johnson was represented by the Miami-Dade County Public Defender's Office during the relevant time period. (See Respondent's Ex. 13).

3. On or about June 12, 2018, Mr. Maloy appeared unannounced at respondent's office, along with his co-defendant, Mr. Johnson.

Respondent was present. Mr. Johnson's attorney, Kristine del Sol of the Public Defender's Office, was not present, nor was any other attorney from the Public Defender's Office present on behalf of Mr. Johnson. (See TFB Ex. 4).

4. Respondent did not call Ms. del Sol nor make any effort to contact her or her office with respect to Mr. Johnson's appearance at his office despite knowing that he was represented. (See TFB Ex. 3 and TFB Ex. 4).

5. Respondent stated in an October 5, 2018, letter to the bar that he advised Mr. Johnson that "he could not speak with him about the case since he was represented by counsel." Respondent indicated that Mr.

Johnson confirmed that although he was unhappy with the public defender, he was in fact represented by that office on June 12, 2018, and “expressed **his intention** (emphasis mine) to hire private counsel.” (See TFB Ex. 4).

6. Respondent further acknowledged in a January 17, 2020, letter to Florida Bar Grievance Committee 11J (see TFB Ex. 3), that he told Mr. Johnson “that he should call his lawyer before proceeding.”

7. Additionally, at final hearing, respondent introduced into evidence an affidavit from Mr. Johnson which stated that prior to retaining private counsel, he was represented by the Miami-Dade Public Defender. (See Respondent’s Ex. 2).

8. According to testimony at the final hearing, private counsel, Dustin Tischler, did not enter a notice of appearance until August 28, 2018. (Vol II, T. 63:17-19)¹.

9. Mr. Tischler further testified that before he assumed representation of Mr. Johnson, the public defender represented him. (Vol II, T. 64:3-5).

10. In fact, based on Mr. Tischler’s testimony, respondent’s testimony, and the various exhibits submitted by The Florida Bar and

¹ The symbol “T.” will refer to the final hearing transcript in the guilt phase in this matter. “Vol.” will refer to the appropriate transcript volume.

Respondent himself, Mr. Johnson continued to be represented by the public defender for 77 days following the meeting at Respondent's office on June 12, 2018. In short, there were no gaps in Mr. Johnson's representation during the relevant time period. (See TFB Ex. 2; TFB Ex. 3; TFB Ex. 4; Respondent's Ex. 2; Respondent's Ex. 13). Furthermore, in all the communication from the Respondent to the Florida Bar, Respondent acknowledged that Mr. Johnson never indicated he had already fired his public defender attorney and hired private counsel, but he intended to do so. This was corroborated by Mr. Johnson in his second affidavit (see Respondent's Ex. 2 para. 5)

11. However, Respondent testified at final hearing that Mr. Johnson was a crucial witness in the criminal proceedings against his client, who said at the June 12, 2018, meeting that he was not represented and that "I certainly did not know who the lawyer was." (See Vol. II, T: 151:21-152:8).

12. Testimony was given at final hearing by Assistant State Attorney Daniel Walsh, who testified about an email sent to him by an associate at respondent's law firm, in which Kristine del Sol and respondent were both copied. (See Vol. II, T: 8-9.) Mr. Walsh further testified that the email dealt with matters related to the two co-defendants and that it was sent on May 4, 2018, approximately 39 days before the meeting which took

place at respondent's office between respondent and the co-defendants. (See Vol. II, T 9:22-10:4).

13. During the June 12, 2018, meeting in the Respondent's office and in the absence of his attorney, Mr. Johnson told respondent that he wanted to testify on behalf of respondent's client, his co-defendant. (See Vol. II, T. 165:17-20; 166:15-24).

14. An Affidavit, commonly known as a *Byrd Affidavit*², was then prepared for and executed by Mr. Johnson. The Affidavit was notarized by respondent's associate. (See Vol. II, T.166:9-167:9).

15. The *Byrd Affidavit* averred that Mr. Johnson wanted 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. Thereafter, he would testify on behalf of Mr. Maloy. (See TFB Ex. 1).

16. The *Byrd Affidavit* was filed with the trial court in respondent's client's case, Case No. F16-21853A, in Miami-Dade County Circuit Court, on June 12, 2018, the same day Mr. Johnson came to respondent's office. (See Respondent's Ex. 6). It was never filed in Mr. Johnson's own case, styled as Case No. F16-21853B (See Respondent's Ex. 13).

² *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. Ct. App. 1970).

17. At the guilt phase of the final hearing, Ms. del Sol testified that respondent never secured her permission to speak to her client. (See Vol I, T. 65:23-25).

18. Ms. del Sol further testified that she never had the opportunity to counsel her client as to the consequences related to the communication between Mr. Johnson and respondent. (See Vol I, T. 66:1-4).

19. Finally, Ms. del Sol testified that respondent never informed her that he had obtained the *Byrd* Affidavit from her client. This is further evidenced by the fact that respondent did not file it in her client's case, case No. F16-21853B. (See Vol I, T. 68 and Respondent's Ex. 13).

20. On or about July 9, 2018, respondent filed a Motion for Severance of Defendants in respondent's client's case, Case No. F16-21853A. (See Respondent's Ex. 6; and Respondent's Ex. 9).

21. A hearing on the Motion for Severance of Defendants was held on July 19, 2018, before the Honorable Spencer Multack. Kristine del Sol of the Public Defender's Office appeared on behalf of Mr. Johnson. (See TFB Ex. 2).

22. In response to Judge Multack's inquiry, Ms. del Sol confirmed on the record that the *Byrd* Affidavit was obtained without her knowledge, that she was unaware her client had been to respondent's office, and that

she only learned of the *Byrd* Affidavit when Assistant State Attorney Daniel Walsh informed her of it. (See TFB Ex. 2: 7-8.)

23. Under oath, Mr. Johnson confirmed that at the time of executing the *Byrd* Affidavit he was represented by the Public Defender's Office, albeit not Ms. Del Sol, and that his lawyer was not present. (See TFB Ex.2:12.)

24. Respondent proffered to the court that Mr. Johnson would testify that the drugs at issue belonged to him and not respondent's client, Mr. Maloy. (See TFB Ex. 2:7). In responding to whether he acquired this information from Mr. Johnson, respondent argued that it was irrelevant for the purpose of the motion. (See TFB Ex. 2:10). Respondent further proffered that he recommended Mr. Johnson call his attorney. (See TFB Ex. 2:13-14). However, no such call took place.

25. Respondent called Juan de Jesus Gonzalez, an attorney with 38 years of experience, to testify on his behalf at final hearing. Mr. Gonzalez was offered as an expert in the defense of criminal matters.

26. On direct examination, Mr. Gonzalez testified that the situation respondent found himself in on June 12, 2018, when Mr. Johnson went to his office was "tricky." (See Vol. II, T. 96:2-10).

27. Mr. Gonzalez testified that when a represented person comes into an attorney's office stating that they committed a crime, that is in fact the subject of the representation (See Vol II. T. 96:2-10).

28. This referee finds that the Miami-Dade Public Defender's Office represented Mr. Johnson during the June 12, 2018, meeting between him and Respondent.

29. This referee further finds that based on the evidence Respondent knew and understood that Mr. Johnson was represented by an attorney from the office of the public defender on June 12, 2018.

30. This referee further finds that the Respondent having worked as a criminal defense attorney for so many years and once worked as a public defender in the same office as Ms. Del Sol and knew the phone number of the office by heart, he could have easily found out the particular attorney representing Mr. Johnson even if he did not personally know it was Kristin del Sol on June 12, 2018.

31. Respondent points to the fact that Mr. Johnson received a favorable plea deal from the state attorney's office as evidence that he did not violate 4-8.4(d) (Conduct prejudicial to the administration of justice).

32. However, respondent secured an affidavit in which Mr. Johnson sought to have his case litigated first, so he could extinguish his fifth

amendment right against self-incrimination and offered to testify on behalf of a co-defendant when the respondent knew he was a represented person and without securing his attorney's consent, nor giving Mr. Johnson the benefit of consultation with his attorney. The violation was complete when Respondent communicated with a represented person about the subject of the representation.

III. RECOMMENDATIONS AS TO GUILT.

I recommend that Respondent be found guilty of violating the following Rules Regulating the Florida Bar:

Rule 4-4.2(a) (Communication with a represented person) and
Rule 4-8.4(d) (Conduct prejudicial to the administration of justice).

This Referee finds by clear and convincing evidence that Respondent violated the following rules regulating the Florida Bar:

Rule 4-4.2(a) (Communication with a represented person)

When Mr. Johnson attended Respondent's office with Mr. Maloy on June 12, 2018, it was clear to him (Mr. Johnson) that he was represented by the office of the public defender. He expressed being unhappy with their representation, and an intent to fire them, but it was clear that the "firing" had not taken place, neither had he hired a private attorney to represent

him. I find by clear and convincing evidence that the Respondent also knew Mr. Johnson was represented because he recommended Mr. Johnson call his attorney with the Respondent informing him, he had a right to an attorney.

On that date at this meeting, an affidavit commonly known as the "Byrd Affidavit" was prepared by the office of the Respondent at the request of the Respondent which sought to extinguish Mr. Johnson's fifth amendment right to remain silent so he could testify on behalf of Mr. Maloy in the case with which they had both been charged. This affidavit happened after the Respondent discussed with Mr. Maloy, the consequences of Mr. Johnson's potential testimony as it would affect Mr. Maloy and Mr. Johnson but Mr. Johnson did not have the benefit of his attorney or any other attorney from the public defenders' office or anywhere else discuss the consequences of his potential testimony as it relates to him. I find by clear and convincing evidence that the preparation of this affidavit in and of itself is the subject of the representation and therefore the Respondent is in violation of this rule.

Rule 4-8.4(d) (conduct prejudicial to the administration of justice)

I find by clear and convincing evidence that Respondent clearly violated this rule when he engaged in impermissible communication with Mr. Johnson and had him swear out an affidavit without the benefit of his own attorney's advice. Respondent further violated the rule when he immediately filed the prejudicial affidavit and sought to use it in court proceedings to obtain a severance of the case still without any communication with Mr. Johnson's attorney. These actions to this Court constitute conduct prejudicial to the administration of justice.

I recommend that this case be set on November 10, 2021, at 1.30pm for a sanctions hearing.

Dated this 3rd day of November, 2021.



Honorable Chiaka Ihekwa, Referee
North Dade Justice Center
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SUPPLEMENTAL REPORT OF REFEREE (AS TO SANCTIONS)

I. **SUMMARY OF PROCEEDINGS**

These disciplinary proceedings were bifurcated at the request of Respondent.

On October 11, 2021, following conclusion of the trial in the guilt phase of this matter, the undersigned Referee issued her Preliminary Report of Referee setting forth specific findings of fact as to Respondent's misconduct and recommending 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) of the Rules Regulating the Florida Bar. Thereafter, on October 21, 2021, Respondent filed a Motion to Reopen Proceedings for Newly Obtained Evidence to which the

Bar filed a response in opposition. Respondent's motion was denied by this Referee on November 3, 2021.

Pursuant to the bifurcation of these proceedings, a sanctions hearing occurred on December 13, 2021, and December 20, 2021. It is noted that Respondent called multiple character witnesses to testify on his behalf at said sanctions hearing. All items properly filed including pleadings, recorded testimony (if transcribed), exhibits in evidence, and the Preliminary and Supplemental Reports of Referee, constitute the record in this case and are forwarded to the Supreme Court of Florida. The instant Supplemental Report of Referee (as to Sanctions) sets forth this Referee's sanction recommendation and the basis for same. The earlier Preliminary Report of Referee is specifically incorporated herein.

In the proceedings to determine appropriate sanctions, the following attorneys appeared as counsel for the parties:

For The Florida Bar: Rita Florez
Arlene Kalish Sankel

For the Respondent: Benedict P. Kuehne
Barry Wax (at guilt phase)

In these proceedings, the following witnesses testified at trial on behalf of the Respondent as character witnesses:

Witness Name

Jonathan S. Schwartz
Caridad Dearmas Acosta
Adrian Alvarez
Joshua Alexander
Crystal Beale
Doug Isenberg
Michael Betancourt
Tzardell Blackshear
Nancy Browne
Richard Browne
Yehuda Bruck
Lorna Castellanos
Dr. I Bruce Frumkin
Michael Graham
Gloria Heck
Bill Heck
Adam Kessler
Scott Levine
Gloria McConnell
Ted Mastos
Hon. Alberto Milian
Juan Mourin Sr.
Janet Palacios
Sandra Schwartz
Alan Soven
Terri Cooper Space
Dr. Scott Weinstein

II. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

The Florida Supreme Court explained the purposes of discipline 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 clear and convincing evidence, viewed in light of the specific fact-based circumstances of this case, established that Respondent's misconduct, while violating the Florida Rules of Professional Conduct, fortunately did not cause any injury or cause potential harm to any other person. Respondent fully recognized and appreciates the gravity of his conduct, and its incompatibility with the Florida Rules of Professional Responsibility. As he testified at trial and during the sanctions hearing, Respondent believed, imperfectly, at the time that he was following the Florida Supreme Court precedent of *Inquiry Concerning a Judge (Decker)*, 212 So. 3d 291 (Fla. 2017).

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. 90-day suspension from the practice of law with automatic reinstatement at the end of the period of suspension as provided in R. Regulating Fla. Bar 3-5.1 (e)

B. Upon automatic reinstatement to the Florida Bar, Respondent shall be placed on a one (1) year period of probation to run concurrent with any other pending disciplinary sanctions. As a special condition of probation, Respondent should continue his therapeutic treatment with FLA and complete twenty hours (20) of additional ethics courses over the required minimum.

C. Payment of The Florida Bar's costs in these proceedings.

This sanction constitutes a fair discipline while encouraging the reformatory practices Respondent has implemented in the three and one-half years since the subject conduct occurred. A concurrent sentence is particularly appropriate here when this matter has been pending for several years as The Florida Bar and Respondent were involved in another grievance matter which occurred **after** this incident took place. I find that the Respondent is already undertaking rehabilitative measures as he awaits the outcome of his prior matter, and the concurrent nature of the sanction will enable the Respondent to continue with these rehabilitative measures.

I find that a rehabilitative suspension (more than 90 days), as sought by The Florida Bar, is unnecessary in this instance when considering the entire facts of the case. This Referee has reviewed and considered Respondent's prior disciplinary matters and has taken them into consideration to the extent to which it is necessary.

III. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

4.3 FAILURE TO AVOID CONFLICTS OF INTEREST

The following sanctions are generally appropriate in cases involving conflicts of interest:

- (b) Suspension is appropriate when a lawyer knows of a conflict of interest, does not fully disclose to a client the possible effect of that conflict and causes injury or potential injury to a client.

6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION

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:

- (b) 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.

6.2 ABUSE OF THE LEGAL PROCESS

The following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

(b) Suspension. Suspension is appropriate when a lawyer knowingly violates a court order or rule and causes injury or potential injury to a client or a party or causes interference or potential interference with a legal proceeding.

7.1 DECEPTIVE CONDUCT OR STATEMENTS AND UNREASONABLE OR IMPROPER FEES

The following sanctions are generally appropriate in cases involving deceptive conduct or statements, improper division of fees, or unreasonable or improper fees.

(b) 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.

8.1 VIOLATION OF COURT ORDER OR ENGAGING IN SUBSEQUENT SAME OR SIMILAR MISCONDUCT

The following sanctions are generally appropriate in cases involving prior discipline:

(b) 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.

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.

IV. CASE LAW

1. Disbarment Is Not Supported.

The Florida Bar has requested disbarment, but I find its proffered cases and argument do not support its position. The misconduct for which Respondent has accepted responsibility arose from his effort, albeit misguided, to provide full and effective assistance of counsel in a criminal case which fortunately did not do any harm to any other person or the system of justice.

I considered the following case law prior to recommending discipline:

In Re: Decker, 212 So. 3d 291, 293 (Fla. 2017), where there was clear evidence that the client was no longer represented at the time the accused lawyer had direct contact with him. The *Decker* case differs from the instant matter in that Decker was directly and unequivocally informed by the person in question that he was no longer represented by counsel of record. The Referee does not consider *Decker* to be analogous.

Florida Bar v. Adorno, 60 So. 3d 1016 (Fla. 2011), is cited by the Bar in support of disbarment despite the considerable differences from the present case. In *Adorno*, the Supreme Court imposed a 3-year rehabilitative suspension arising from the lawyer's breach of a fiduciary duty owed to the putative class. The Supreme Court found that the attorney's actions regarding the disproportionate settlement amount, as well as the terms of the settlement, created a conflict of interest that prejudiced the remaining class members. Further, the lawyer abandoned the putative class via the settlement negotiations, hid the terms of the settlement agreement from the class through a nondisclosure agreement, and stopped litigating on behalf of the class as a result of a standstill agreement. The sanction of a 3-year suspension was necessary since the lawyer's severe misconduct was deceitful and deceptive, prejudicial to the

administration of justice, and inured to the lawyer's personal, financial benefit at the expense of his clients. I do not consider *Adorno* to be analogous to this case.

The three-year suspension in *Florida Bar v. Peterson*, 680 So. 2d 425 (Fla. 1996), arose from the lawyer's involvement in a multi-million-dollar scheme that adversely affected a client by entering into a disallowable business relationship with the client, charging an excessive fee, and not responding to the Bar's inquiries. The multiple violations of the Bar rules warranted the significant rehabilitative suspension, in contrast with this matter in which Respondent took responsibility for his conduct and implemented remedial action. I do not consider *Peterson* to be analogous to this case.

Florida Bar v. Buckle, 771 So. 2d 1131 (Fla. 2000), does not support disbarment. There, the Florida Supreme Court rejected the referee's recommendation of a thirty-day suspension and ordered a public reprimand for a criminal defense lawyer's misconduct that included contacting the alleged crime victim by telephone and by letter. The letter, sent to the victim after the lawyer was told the victim did not want contact by the lawyer, was humiliating and disparaged her character, and caused her to consider abandoning the criminal complaint she had filed against the lawyer's client.

Finding that relevant case law involving a lawyer sending disparaging communications to third persons was consistent with a reprimand, the Supreme Court reduced the recommended suspension to a reprimand. *Fla. Bar v. Buckle*, 771 So. 2d at 1134.

Nor does *The Florida Bar v. Carlon*, 820 So. 2d 891 (Fla. 2002), support a disbarment sanction. That case involved a 91-day suspension for cumulative misconduct, including collecting an excessive fee.

The disbarment imposed in *The Florida Bar v. Norkin*, 183 So. 3d 1018 (Fla. 2015), came about when a suspended lawyer continued to practice law and failed to comply with the requirements of his suspension. Respondent's conduct is not similar and *Norkin* is not helpful to the required analysis.

The Florida Supreme Court ordered disbarment in *The Florida Bar v. Ratiner*, 238 So. 3d 117 (Fla. 2018), based on a lawyer's history and past misconduct of disrupting court proceedings, engaging in a pattern of disrespectful conduct over the years, and disparaging a lawyer who was examining a witness. Because there was no indication the lawyer 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. MacNamara, 132 So. 3d 165, 171 (Fla. 2013), involved repeated dishonesty by a Respondent during litigation and resulted in a suspension for ninety (90) days. The lawyer misrepresented to the probate court that he had "filed a tax return with the IRS that was still being considered, when he knew he had not sent the IRS a signed filed tax return." *Id.* The lawyer sent a deliberately misleading cover letter to the IRS and failed to honestly inform his client about the status of the tax return. Also, that lawyer made repeated misrepresentations to the Bar by claiming he filed the tax return in March 2005 when he had not done so. The Court, however, did not impose a rehabilitative suspension.

The Florida Bar v. Committe, 916 So. 2d 741 (Fla. 2005) involved a lawyer who pursued frivolous claims and failed to comply with discovery in order to harass the opposition. After numerous incidents of knowingly filing frivolous claims, the Court ruled that a 90-day suspension followed by one year probation was appropriate.

V. AGGRAVATING FACTORS: I find the following factors in aggravation:

- 3.2(b)(1) Prior Disciplinary Offenses. The Referee recognizes that admonishments imposed more than seven years prior are not considered aggravating factors¹. Accordingly, this Referee finds the following prior disciplinary offenses as aggravating:

- A May 29, 2012 suspension for a period of 90 days in Supreme Court Case No. SC11-2143, The Florida Bar File No. 2011-70,673(17A), for six rule violations, including four violations involving dishonest or deceitful conduct.

- A finding of guilt by the Florida Supreme Court in an opinion dated November 7, 2019, in Supreme Court Case No. SC17-1391, The Florida Bar File No. 2016-70,106(11J), for conduct involving Respondent's use of two exhibits at a deposition in a criminal matter which the Supreme Court found Respondent to have altered and which were deceptive on their face. The sanction for this finding of guilt is currently the subject of an appeal pending before the Florida Supreme Court. (It should be noted that this

¹ As a result, I did not consider the follow prior disciplinary actions in aggravation:

- An April 10, 1997, public reprimand in Supreme Court Case No. SC90-204, The Florida Bar File No. 1996-71,740(11B), for four rule violations, including two rule violations involving dishonest or deceitful conduct.
- A June 20, 2002 public reprimand in Supreme Court Case No. SC02-787, The Florida Bar File No. 2001-71,404(11C), for seven rule violations, including three rule violations involving dishonest or deceitful conduct.

incident occurred after the incident for which the Respondent is currently facing sanctions.)

- 3.2(b)(3) A Pattern of Misconduct. Respondent's disciplinary history spans over two decades and seven instances of misconduct that resulted in admonishments, discipline, and findings of guilt by the Florida Supreme Court. In that time, Respondent has engaged in a pattern of misrepresentation of facts to the grievance committee and tribunal in an effort to bend the rules. When looked at as a whole, Respondent's disciplinary history shows that in each instance of misconduct, Respondent shapes the truth in an effort to excuse clear violations of the Rules Regulating The Florida Bar. While not all of Respondent's prior disciplinary offenses are considered aggravating factors for purposes of factor 3.2(b)(1) (Prior Disciplinary Offenses), each of his prior disciplinary offenses may be considered for purposes of determining whether there is a pattern of misconduct. "This Court views cumulative misconduct more seriously than an isolated instance of misconduct." *The Florida Bar v. Carlon*, 820 So.2d 891, 899 (Fla. 2002). "In determining appropriate discipline, we consider prior misconduct and cumulative misconduct, and treat cumulative misconduct more severely than isolated misconduct." *The Florida Bar v.*

Walkden, 950 So.2d 407, 410 (Fla. 2007). Several of Respondent's prior offenses involve dishonest or deceitful conduct:

- In 1995, Respondent received an admonishment for filing a false motion for continuance, in which he misrepresented the basis for the continuance, as well as the prosecutor's agreement to same. (See TFB Ex. 1).

- In 1996, Respondent received an admonishment arising from the dissemination of an advertisement that was not filed with the advertising section of The Florida Bar pursuant to the requirements of the Rules regulating The Florida Bar. Additionally, the advertisement did not contain the word "advertisement" in red ink.

- In 1997, Respondent received a public reprimand for failure to comply with numerous court orders, for which conduct he was held in contempt. The case involved two rule violations for dishonest or deceitful conduct, including violating rules 4-3.3(a) (making a false statement of material fact or law to a third person); 3-4.4(c) (A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and 4-

8.4(d) (conduct prejudicial to the administration of justice). (See TFB Composite Ex. 2).

- In 2002, Respondent received a public reprimand for making numerous unsubstantiated complaints against his former law partners and made an additional misrepresentation to the judge stating that the former partners were under criminal investigation despite having been informed by the police that there was no criminal investigation. This case involved three rule violations for dishonest or deceitful conduct. (TFB Ex. 4).

- In 2007, Respondent received an admonishment arising from the dissemination of a direct mail advertisement with numerous violations, including making misleading statements and statements improperly promising results. (See TFB Ex. 5).

- In 2012, Respondent received a ninety-day suspension with probation for a period of one year, for conduct involving Respondent's signing his client's affidavit and improperly notarizing same. This case involved three rule violations for dishonest or deceitful conduct. (TFB Ex. 6).

- In 2019, after disapproving the Report of Referee, the Supreme Court found Respondent guilty of Misconduct and Minor Misconduct, as well as engaging in dishonest or deceitful conduct. The

sanction for this finding of guilt is currently the subject of an appeal. (TFB Ex. 7).

- 3.2(b)(9) Substantial Experience in the Practice of Law.

Respondent was admitted to the Bar on August 13, 1986.

VI. MITIGATING FACTORS:

1. Absence of dishonest or selfish motive, Standard 3.3(b)(2).

Respondent's conduct was done without any selfish or dishonest motive. Respondent acted in good faith in seeking a severance of his client from the codefendant and did so in a manner that caused no injury or potential harm to either defendant.

2. Personal or emotional problems, Standard 3.3(b)(3). The evidence is 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 an internal need to correct instances of manifest injustice. This defining value motivates 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 the line of professionally acceptable behavior. As is evident from the entirety of the evidence in this matter, Respondent is well on the path toward transformation and reform following his willingness to work diligently to better channel his emotional needs. I find this to be a meaningful mitigation factor. See *Florida Bar v. Liberman*, 43 So. 3d 36, 40 (Fla. 2010) (consideration of rehabilitation efforts in determining whether to make disbarment order effective *nunc pro tunc* to the date of the emergency suspension).

3. Timely good faith efforts to make restitution or rectify consequences of misconduct, Standard 3.3(b)(4). As is evident from the record of proceedings, Respondent made a full and complete disclosure of the circumstances surrounding the preparation of the *Byrd* affidavit and his reason for doing so.
4. Full and free disclosure to the Bar or cooperative attitude toward the proceedings, Standard 3.3(b)(5). 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. He readily acknowledged the appearance of his actions even as he tried to eliminate any possible adverse impact of his conduct.

5. Character or reputation, Standard 3.3(b)(7). I considered the significant testimony of the mitigation witnesses and carefully evaluated the entirety of Respondent's testimony. I have no doubt that Respondent is a passionate criminal defense lawyer. Respondent provides effective assistance to clients who may not be financially eligible for appointment of defense counsel but who are in need of engaging private counsel. Depriving clients of the representation provided by Respondent and his firm would be disproportionate to Respondent's acknowledged misconduct. He 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 goes above and beyond the obligations of cases to include mental health or environmental factors, as was explained by several of his character witnesses. I also considered evidence of Respondent's extensive charitable and community contributions.

Respondent has engaged in facilitating 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. Mr. Schwartz and his firm continue to handle dozens of pro bono cases, as he has done every year for the past 30 years.

6. Interim rehabilitation, Standard 3.3(b)(10). Substantial uncontested testimony was offered by witnesses and Respondent as to his 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 practice who can provide him with impartial feedback concerning his creative approaches to client representation. In addition, Respondent continues to participate in a structured and rigorous FLA therapeutic program.
7. Imposition of other penalties or sanctions, Standard 3.3(b)(11). The 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 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. As Circuit Judge Milian noted in his compelling testimony, 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.

8. Remorse, Standard 3.3(b)(12). Respondent demonstrated remorse through his testimony that was corroborated by witnesses, evidence of significant revisions to his practice, his voluntary pursuit of FLA rehabilitation, treatment, therapy, and his implementation of procedures to better enable him and his firm to recognize the ethical issues that arise in a criminal defense practice.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following:

Personal History of Respondent:

Age: 61

Date admitted to the Bar: August 13, 1986

Prior Discipline

- Respondent received an admonishment for minor misconduct by the Eleventh Judicial Circuit Grievance Committee "B" by service of a Grievance Committee Report of Minor Misconduct dated March 29, 1995, in The Florida Bar File No. 94-71,026 (11B), for violation of 4-8.4(d) (conduct prejudicial to the administration of justice). where Respondent misrepresented to two prosecutors that his client was incarcerated in another jurisdiction to secure continuances on a case. Ultimately, he blamed his high-volume practice and paralegal for the continuances which he stated she prepared and signed for him.

- Respondent tendered a consent judgment and received a public reprimand by Order of the Florida Supreme Court dated April 10, 1997, in Supreme Court Case No. SC90-204, The Florida Bar File No. 1996-71,740(11B), for violating 4-3.3(a) (making a false statement of material fact or law to a third person); 4-4.4(c) (A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; 4-8.4(c) (engage in conduct

involving dishonesty, fraud, deceit, or misrepresentation); and 4-8.4(d) (conduct prejudicial to the administration of justice).

- Respondent received an admonishment for minor misconduct by the Eleventh Judicial Circuit Grievance Committee "B" by service of a Grievance Committee Report of Minor Misconduct dated December 19, 1996, in The Florida Bar File No. 1996-71,789(11B), for violating advertising rule requirements of the Rules Regulating The Florida Bar.

- Respondent tendered a consent judgment and received a public reprimand by Order of the Florida Supreme Court dated June 20, 2002, in Supreme Court Case No. SC02-787; The Florida Bar File No. 2001-71,404(11C), for violating Rules 4-3.1 (meritorious claims and contentions); 4-3.3(a)(1) (making a false statement of material fact or law to a third person); 4-4.4 (respect for rights of third persons); 4-5.6 (restrictions on right to practice); 4-8.4(a)(violate or attempt to violate the Rules of Professional conduct); 4-8.4(c) (engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct.

- Respondent received an admonishment for minor misconduct by the Second Judicial Circuit Grievance Committee "S" by service of a Grievance Committee Report of Minor Misconduct dated May

23, 2007, in The Florida Bar File No. 2007-90,330(02S) for violating advertising rule requirements of the Rules Regulating the Florida Bar.

- Respondent tendered a consent judgment and was suspended for 90 days by Order of the Florida Supreme Court dated May 29, 2012, in Supreme Court Case No. SC11-2143, The Florida Bar File No. 2011-70,673(17A), for violating 4-1.8(e) (A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation); 4-3.3(a)(1) (A lawyer shall not knowingly make a false statement of fact or law to a tribunal); 4-4.1(a) (In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person); 4-8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct); 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); and 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

- The Florida Supreme Court found Respondent guilty of violating Rules 3-4.3 (Misconduct and Minor Misconduct) and 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), after rejecting the Report of Referee in Florida Supreme

Court Case No. SC17-1391; The Florida Bar File No. 2016-70,106(11J), in an opinion of the Florida Supreme Court dated November 7, 2019. The Court remanded the matter for a sanction hearing and ordered that a new referee be appointed for that hearing. The conduct involved the use of two exhibits in a criminal matter during a deposition. The Supreme Court found that Respondent altered two photos in a lineup and the photos were deceptive on their face. The sanction for this finding of guilt is currently the subject of an appeal pending before the Florida Supreme Court.

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida

Bar:

Administrative Fee [Rule 3-7.6(q)(I)]	\$1,250.00
Staff Investigator's costs	\$150.40
Attendance of court reporter (motion hearing held 5/17/21)	\$115.00
Copy of Transcripts of (motion hearing held 5/17/21)	\$96.00
Attendance of court reporter (motion hearing held 8/23/21)	\$80.00
Attendance of court reporter (final hearing held 9/13/21to 9/15/21)	\$5,296.10

Attendance of court reporter (sanctions hearing held 12/13/21)	\$400.00
Attendance of court reporter (sanctions hearing held 12/20/21)	\$120.00
TOTAL	\$7,507.50

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 7th day of February, 2022.

Chiaka Ngozi Ihekweba, Referee
North Dade Justice Center
15555 Biscayne Blvd., Room 209
Miami, FL 33160-4615

Original To:

Clerk of the Supreme Court of Florida; Supreme Court Building; 500 South Duval Street, Tallahassee, Florida, 32399-1927

Conformed Copies to:

Barry Michael Wax, Attorney for Respondent, barry@barrywax.com

Benedict Kuehne, Attorney for Respondent, ben.kuehne@kuehnelaw.com

Rita Florez, Bar Counsel, rflorez@floridabar.org

Patricia Ann Toro Savitz, Staff Counsel, psavitz@floridabar.org

6/13 (06)

EXHIBIT
Respondent Exhibit 1

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

FELONY DIVISION

STATE OF FLORIDA,
Plaintiff,

CASE NO.: F16021853A

vs.

JUDGE: MULTACK

DEMARRIS MALOY,
Defendant.

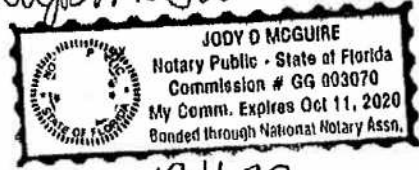
BYRD AFFIDAVIT

COMES NOW the CO-Defendant, GABRIEL ANTWAN JOHNSON, Hereby files this
Byrd Affidavit..:

- 1.00 I am prepared to offer testimony on behalf of the co-defendant Demarris Maloy.00
- 2.00 At this time, I have a 5th Amendment right against self-incrimination.00
- 3.00 As a result, I am seeking to have my case litigated first, thereby extinguishing my00
right to remain silent.
- 4.00 And thereafter I will testify on behalf of Mr. Maloy.00

Sworn to on the 12th of June, 2018 IN Miami, Dade County.

Jody McGuire



10-11-20

Gabriel Johnson

GABRIEL JOHNSON

personally known

CERTIFICATE OF SERVICE

RECEIVED, 03/30/2021 07:44:28 AM, Clerk, Supreme Court

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court and delivered to the State Attorney's Office, Felony Division, felonyservice@miamisao.com, on this 12th day of June, 2018.

Respectfully submitted,

SCHWARTZ & ASSOCIATES
200 Southeast 1st Street | Suite 505
Miami, Florida 33131
Tel: 305.523.2250 | Fax: 305.523.2231

BY: /s/ Jonathan S. Schwartz
Jonathan S. Schwartz, Esq.
Florida Bar Number 579361
jsslaw@hotmail.com

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

FELONY DIVISION

STATE OF FLORIDA,
Plaintiff,

vs.

**CASE NO.: F16-21853A
DIVISION: F006
JUDGE: SPENCER MULTACK**

DEMARRIS GREGORY MALOY,
Defendant.

MOTION TO SEVER DEFENDANTS AND FOR SUBSEQUENT TRIAL

COMES NOW the Defendant, **DEMARRIS GREGORY MALOY**, by and through undersigned counsel and pursuant to Florida Rules of Criminal Procedure Rule 3.152(b), hereby files this *Motion to Sever Defendants and for Subsequent Trial* and, in support thereof, states as follows:

1. This matter is currently set to be tried together with case number F16-21853B (State of Florida vs. Gabriel Antwan Johnson) on August 20, 2018.

2. Mr. Maloy has reasonable grounds to believe that Mr. Johnson will give testimony exculpatory to Mr. Maloy in a subsequent trial.

3. Rule 3.152(b), Fla. R. Crim. P., states:

(1) On motion of the state or a defendant, the ***court shall order a severance of defendants and separate trials:***

(A) ***before trial, on a showing that the order*** is necessary to protect a defendant's right to a speedy trial, or is ***appropriate to promote a fair determination of the guilt or innocence of 1 or more defendants;*** or

(B) during trial, only with defendant's consent and on a showing that the order is necessary to achieve a fair determination of the guilt or innocence of 1 or more defendants.

(Emphasis added).

4. *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970) and its progeny sets forth what a defendant must show to sever based on his desire to offer exculpatory testimony of a co-defendant. See *Taylor v. State*, 472 So. 2d 814, 815 (Fla. 3d DCA 1985) (“[T]he defendant must show: (1) a bona fide need for the testimony, (2) the substance of the testimony, (3) its exculpatory nature and effect, and (4) that the co-defendant will in fact testify if the cases are severed.”) (citing *United States v. Hewes*, 729 F.2d 1302 (11th Cir. 1984), *Tifford v. Wainwright*, 588 F.2d 954 (5th Cir. 1979), *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970)).

4.1 Mr. Maloy needs Mr. Johnson’s testimony in order to present a full and complete defense.

4.2 Mr. Johnson would testify to his knowledge of the parties and what happened on October 27, 2016.

4.3 Mr. Johnson’s testimony is exculpatory to Mr. Maloy both in nature and effect.

4.4 The only way Mr. Maloy can ensure that Mr. Johnson testifies on his behalf is *if* the cases are severed and *only* in a subsequent trial or hearing *after* Mr. Johnson’s own Fifth Amendment rights regarding self-incrimination have been extinguished.

5. The Court has the discretion to determine the sequence of the separate trials. *Byrd*, 428 F.2d at 1022 (citing *United States v. Sanders*, 266 F. Supp. 615 (W.D.La. 1967)); *Taylor*, 472 So. 2d at 815 (citing *United States v. Rosson*, 441 F.2d 242, 248 (5th Cir. 1971) and *Byrd*, 428 F.2d at 1022).

6. In this case, if Mr. Maloy’s case is tried first, it will deny him of his right to present a full and complete defense on his behalf. Mr. Johnson will not waive his Fifth Amendment right

against self-incrimination prior to his own trial. He would only testify for Mr. Maloy's defense in a subsequent trial.

WHEREFORE, the Defendant, **DEMARRIS GREGORY MALOY**, respectfully requests this Honorable Court grant his *Motion to Sever Defendants and for Subsequent Trial* and enter an Order:

- A. Severing Mr. Maloy and Mr. Johnson into two separate trials; and
- B. Ordering Mr. Maloy's trial to occur subsequent to the trial in case number F16-21853B.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court and delivered to the State Attorney's Office, Felony Division, felonyservice@miamisao.com, and ASA Daniel Walsh, Esq., danielwalsh@miamisao.com, on this 9th day of July 2018.

Respectfully submitted,

SCHWARTZ & ASSOCIATES
200 Southeast 1st Street | Suite 505
Miami, Florida 33131
Tel: 305.523.2250 | Fax: 305.523.2231

BY: /s/ Jonathan S. Schwartz
Jonathan S. Schwartz, Esq.
Florida Bar Number 579361
jsslaw@hotmail.com

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

CASE NO.: F1621853A

JUDGE SPENCER MULTACK
July 24, 2019

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 24, 2019.

APPEARANCES :

Sherri-Ann Grant-Clarke
Chloe Ince-Ingram
Office of the State Attorney

1350 Northwest 12th Avenue

Miami, Florida 33136

Attorneys on Behalf of the State of Florida

Jonathan Schwartz

Donna Peterson

13611 South Dixie Highway

Suite 335

Miami, Florida 33176

Attorneys on Behalf of Defendant

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WITNESS

Opening Statement

By Defense

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P R O C E E D I N G S

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

7 (Thereupon, the following excerpt of proceedings
8 was had at 11:46 a.m.)

DEFENSE OPENING STATEMENT

9
10 **MR. SCHWARTZ:** The evidence is going to
11 show you in this case so much of what the
12 prosecutor just told you is a lie.

13 My client has nothing to do with running
14 anything at this house. Now they're telling you
15 that they're going to show you properly -- a FPL
16 bill, which shows nine months before he paid a
17 bill. That's correct.

18 But you're also going to see several other
19 FPL bills. He is an investor and runs a
20 property. And yes, he pays the FPL bill while
21 he rents it out. He is the landlord.

22 There is no evidence that you're going to
23 hear that he had her live there. There's no
24 evidence whatsoever that he has a piece of
25 property of his inside a rental apartment that

1 he is renting out.

2 You will hear no evidence from any officer,
3 despite what she just represented to you, that
4 anybody saw my client inside after the search
5 was affected on October 27th moving in any
6 direction whatsoever.

7 Now, I'm not sure if you took notes about
8 what she just said. Hold her to her burden.
9 That's what we call integrity.

10 And as we all know, as the saying goes,
11 doing the right thing as jurors is you do it
12 when people are looking and when people are not
13 looking. You do it all the time.

14 And we expect from a prosecutor coming in
15 here to give you the true road map, which she
16 just did not do. You're not going to hear that
17 my client was running a crack house. That's
18 absurd and obscene that you will hear.

19 Now there's two main reasonable doubts in
20 this case. Two being big reasonable doubts in a
21 lot of subsets. The number one reasonable
22 doubt, what I call the hole in the box.

23 Now you heard that we evidently killed
24 Tootsie Roll from the bench. And then ten
25 minutes later, as if we didn't kill one rodent

1 with a cat, we then killed another mouse as if
2 the prosecutor didn't hear anything that
3 happened in the Courtroom.

4 And we said, the only other explanation for
5 reasonable doubt is if there was a hole in the
6 box. And the mouse or well, -- you have a
7 hamster, I think you said, right, if I remember,
8 yeah -- rolled out of the box and therefore, the
9 cat didn't eat it.

10 The hole in this box is Gabriel Johnson.
11 Did you hear the name Gabriel Johnson from the
12 prosecution right now? What are they hiding?

13 Now here's the notes. A, Gabriel Johnson
14 will come in here and again confess that the
15 drugs that were found in the house on October
16 27th were his. That's A.

17 There were two people found there. There
18 were two people inside the apartment. Did you
19 hear that from the prosecution? Was that
20 integrity to hide that fact from you? And this
21 is going to be a theme that you're going to hear
22 as we go through this case.

23 They are hiding everything. They are
24 failing to do an investigation in this case.
25 This case should never have been brought against

1 my client. It was brought against Gabriel
2 Johnson. He was charged with possession with
3 intent to possess cocaine. He pled guilty to
4 said charge.

5 MS. GRANT-CLARKE: Your Honor, can we go
6 sidebar?

7 **THE COURT:** It's overruled.

8 **MR. SCHWARTZ:** He's going to tell you that
9 he pled guilty to said charge. So, A is he
10 confessed to it when he takes the stand. And if
11 for whatever reason he doesn't testify to that,
12 you will see he's already confessed to it in
13 this very Courtroom in this very spot right here
14 and told the Judge those drugs inside there were
15 mine. That's A.

16 You're also going to hear B, that a long
17 time ago, this man felt guilty, Gabriel Johnson,
18 and had announced to the prosecution that he was
19 going to testify on behalf of the defendant.
20 Years ago, he told the prosecution, I am going
21 to testify on behalf of the defendant.

22 My case needs to go first. And then I will
23 testify for Mr. Maloy because I'm the guilty
24 party. This is nothing new. They knew this
25 years ago. So, that's B.

1 It's not something freshly made up. It's
2 something that he announced years ago and filed
3 an affidavit with this Court and you will see
4 that affidavit. That's B.

5 Gabriel Johnson is the guilty party. Two
6 people were found inside there. C, manipulated
7 testimony of the co-defender or shall I say
8 attempted manipulated testimony by the
9 prosecution of the witness who they know has
10 already said I'm going to testify for the
11 defendant.

12 Has already testified in this very spot
13 right here those drugs were mine. And they
14 offered him the sweetest, sweetheart deal to
15 change his testimony.

16 MS. GRANT-CLARKE: Objection.

17 **MR. SCHWARTZ:** And you're going to hear
18 that from the witness on the stand. You're
19 going to see how they tried to manipulated him
20 and say to him, we want you to testify that the
21 drugs were Mr. Maloy's.

22 MS. GRANT-CLARKE: Your Honor, objection
23 made. Can we go sidebar?

24 **THE COURT:** Sure.

25 **MR. SCHWARTZ:** That's what he's going to

1 testify to.

2 **THE COURT:** Sidebar.

3 (Thereupon, a sidebar discussion was held on record
4 at 11:53 a.m.)

5 **THE COURT:** What's the objection?

6 MS. GRANT-CLARKE: Your Honor, at this
7 time, I'm going to be objecting. Defense is
8 making comments in regards to plea negotiations
9 as to another case. I know that I'm coming in
10 on the case but I understand that the cases were
11 severed previously. And I don't think it's
12 relevant to talk about the plea negotiations
13 that were discussed by the co-defendant in this
14 case, Your Honor, especially in terms of
15 sweetheart deals or making improper comments as
16 to what another defendant did in regards to a
17 separate action than what he did on this case.

18 **MR. SCHWARTZ:** It's basic co-defendant.
19 Base -- any time a co-defendant has pled and
20 supposedly flipped, we're entitled to go into
21 his entire deal, exactly what he was offered,
22 exactly what was the nature of the negotiations,
23 what he was looking at. That is open and free
24 game on every single case.

25 **THE COURT:** Well -- well, it, I guess the

1 issue is that the State isn't calling him as a
2 witness.

3 **MR. SCHWARTZ:** Whether they're doing it or
4 not. Whether they're calling him or not as a
5 witness, it doesn't matter.

6 **THE COURT:** Well, --

7 **MR. SCHWARTZ:** They told him --

8 **THE COURT:** -- well, so, wait, wait, wait,
9 wait --

10 **MR. SCHWARTZ:** -- we will give you a plea -
11 -

12 **THE COURT:** Wait.

13 **MR. SCHWARTZ:** -- if you testify --

14 **THE COURT:** Mr. Schwartz. It becomes an
15 issue with regards to his credibility as a
16 witness for the State. That's all I'm saying.

17 **MR. SCHWARTZ:** Maybe it's a question of
18 credibility then.

19 **THE COURT:** Okay. So, it's a question of
20 credibility so.

21 **MR. SCHWARTZ:** Fine.

22 **THE COURT:** If you -- if Mr. Schwartz
23 believes this is what the evidence will show,
24 then I don't see --

25 **MR. SCHWARTZ:** We all know that this is the

1 evidence.

2 **THE COURT:** -- that we have an issue. So,
3 the objection is overruled.

4 **MS. GRANT-CLARKE:** Yes, Your Honor.

5 (Thereupon, the following proceedings were heard at
6 11:55 a.m.)

7 **MR. SCHWARTZ:** What are they trying to hide
8 from you? That Gabriel Johnson's told if you
9 testify against him and say that the drugs were
10 his, we'll give you a sweetheart deal. He says,
11 I'm not doing that.

12 So, then they come to him and they say,
13 okay, you don't have to say that. All we want
14 you to say now is that you don't know who the
15 drugs were. But they weren't yours like we know
16 you swore in front of this Court before.

17 We want you to say what we know you swore
18 on the record is not true. In exchange for
19 that, they said, we will let you go. We are
20 going to give you credit for time served. No
21 jail time, no probation, nothing, goodbye.

22 That's called C, attempted, manipulated
23 testimony. What are they trying to hide?

24 D. Now you're going to hear that evidence
25 is found in the house of 133 individually-

1 packaged rocks of cocaine. No doubt, inside
2 this house where Gabriel Johnson testifies he
3 was living. He says he was living there.

4 But that's not D. That's just a bonus for
5 you. That doesn't even count. He's there.
6 He's arrested there. He's arrested in his room.
7 He says he lives there and he says he's dealing
8 drugs there.

9 But we have more. We have D. What's found
10 in his pocket? Eleven rocks for sale
11 individually wrapped ready to be sold. In his
12 pocket.

13 What the evidence will show is in my
14 client's pocket, how many rocks were in his
15 pocket at the time? Zero. None. But him, they
16 give credit time served and try to manipulate
17 his testimony, the guy who they know is the drug
18 dealer.

19 Eleven individual rocks. You will see him
20 testify to it. You will see the evidence. You
21 will see the piece of paper. You will see the
22 testimony. He's the one that has the rocks.
23 He's the one that's dealing.

24 E. Now they have 11 rocks and you have all
25 of these rocks that he's hidden away somewhere

1 in the kitchen or they find it in the kitchen.

2 I don't know how it got there, frankly. And I'm
3 not sure you're going to hear any testimony one
4 way or another.

5 How much money did Gabriel Johnson have on
6 him? Was it consistent with drug dealing?
7 Eight hundred eighty-one dollars.

8 Now you heard from the State's opening
9 argument that a lot of these sales took place at
10 this residence and we'll get to that. Because
11 who the sales were made -- who made the sales
12 and who actually did the selling and who bought,
13 oh, that's important for you to decide whether
14 my client had anything to do with it. We'll get
15 to that.

16 But what you did hear is that the sales
17 involved \$20 or \$10 or \$40. But mostly \$20 for
18 two crack rocks. So, of the 881, our section E,
19 how many of the \$881, which is a lot of money,
20 on Gabriel Johnson -- 27 of those were twenties.
21 Twenty of them were \$5 bills. Nine of them were
22 \$10 bills. And one was a hundred, one was a 50
23 and one was a \$1 bill.

24 So, it was largely twenties, fives, nickel
25 rocks, twenty of those, twenty fives, 27

1 twenties. That's drug dealer money. That's the
2 guilty party. That's the reasonable doubt.
3 That's the hole in the box where the mouse or
4 the hamster comes out. That's E.

5 Oh, and my bonus before I forgot is
6 actually F. He says he lived there. He's the
7 only person in this case that you will see that
8 says that they live there.

9 You will hear evidence from Mr. Johnson my
10 client never lived there, that my client has
11 investment properties and he lives in a
12 completely different location and has several
13 FPL bills that he pays for his investment
14 properties at that location and other places.

15 Oh, he had \$881. We also have a property
16 receipt what was found on my client while we're
17 at it. And there's two of them so I can't
18 really tell which one is his.

19 But one way or another, it's either \$11 or
20 \$48. Fifty bucks, one way or another. It's not
21 \$881 in drug dealer money with drugs in his
22 pocket. He's got fifty bucks in his pocket.

23 The prosecutor says in opening argument
24 that you're going to hear evidence that he had a
25 key to the outside gate. True as any landlord

1 would have.

2 What about Gabriel Johnson, the guy who
3 actually lives there and is dealing the drugs
4 and has confessed to it? Does he have a key?
5 Did you hear from the prosecutor with the
6 integrity that they showed you, did she do the
7 right thing and tell you that Gabriel Johnson
8 lived there and had a key?

9 And that they tested that key. And you'll
10 see pictures of that tested key. That's G.

11 H is bags were found in his pocket, ten
12 bags. A hundred bags are found somewhere else
13 in the house. Look at his bags. Look at the
14 other bags that were found. And I guarantee
15 you're going to find that those bags look all
16 quite familiar because they're the same
17 packaging.

18 Bags in his pocket, bags in the evidence.
19 That's H.

20 You're also going to hear Gabriel Johnson
21 honestly testifying that this is what he does,
22 that he's a drug dealer. And you don't have to
23 believe his testimony because you'll see from
24 his prior record that he's been convicted of
25 exactly this 11 times.

1 Eleven prior convictions. And he's no
2 stranger to prison, the one who they give a
3 sweetheart deal to. Been in prison for ten
4 years previously for drug trafficking of cocaine
5 and for possession of a gun.

6 Did ten years in prison. Got out of that.
7 Got arrested, convicted again. Went for another
8 three years in prison. He's been in prison, in
9 and out his entire life. This is what he does.
10 Eleven prior times.

11 That's I. And lastly, Gabriel Johnson is
12 the guilty party. Now you heard about there was
13 a bunch of sales there. Now you're not going to
14 hear any evidence in this case whatsoever or any
15 suggestion, no confidential informant that's
16 going to come in. They're going to be hiding
17 that from you as well.

18 There's not going to be anyone to testify
19 that any pictures were taken of anybody who was
20 there and sold anything. Certainly, there will
21 be no testimony that Demarris Maloy was there on
22 any day and sold anything to anyone.

23 But that's not true of Gabriel Johnson, the
24 one who they let go. The one who they gave
25 credit time served for. You will hear evidence

1 that on the very last sale that she just talked
2 about, Gabriel Johnson did the sale two days
3 before the Officer Gill, their lead officer's
4 going to testify the description of the person
5 who did the sale matches Mr. Johnson.

6 And two days later, they do the search and
7 Mr. Johnson is there. If you can believe it,
8 that's reasonable doubt number one. Gabriel
9 Johnson. That's a lot to digest right there.
10 There's a lot of pieces and parts to that.

11 Now the Judge is going to instruct you at
12 the end of this case that reasonable doubt can
13 arise from the evidence. And that's what we
14 just talked about right here from what Gabriel
15 Johnson is going to say and what we know about
16 him, what we know of his history, and from the
17 actual evidence in the case.

18 But you also have to look at what they're
19 hiding from you, what was not done. What kind
20 of bogus investigation, what kind of non-
21 investigation was done in this case and why?

22 Now they try to -- you heard on -- on voir
23 dire, they tried to say well, this isn't on
24 television and television is different than a
25 Courtroom. And we don't do what's on

1 television. In the Courtroom, it's a whole
2 different situation.

3 Really? You have 133 bags. You have a
4 gun. You have a magazine. You've got bullets.
5 You've got bags and bags and bags. Has anybody
6 heard of fingerprints before? Swabbing, trying
7 to -- one print, one attempt at prints? None.

8 That's called lack of evidence creating
9 reasonable doubt. Why no prints in this case?
10 The case is three years old. Why no DNA? We
11 hear about DNA. Everyone's doing DNA.
12 Everyone's taking DNA. Everyone's being found
13 innocent years later on DNA.

14 When you have a case like this and the
15 overwhelming evidence says Gabriel Johnson is
16 the guilty party, DNA, prints. As we've all
17 heard, it's required now to wear these body-worn
18 cameras.

19 And as someone, I think it was Mr. Albert -
20 - I can't remember who said, well, you know the
21 police officers can turn those body-worn camera
22 off. And when they're doing a search or they're
23 breaking down the door and coming in guns a
24 blazing, usually, they have a camera or a body-
25 worn camera or something so that you can see

1 what's going on inside there.

2 None of that. No prints, no DNA, no body-
3 worn camera in this case. Nothing.

4 There's a confidential informant. The
5 confidential informant went to the house several
6 times. We don't know who he is. They're not
7 calling him. You're not entitled to know.

8 We're going to ask the officer questions
9 about the CI. And he's going to say, I'm not
10 answering that. I'm not telling you anything
11 about the CI. It's a secret.

12 That's what the evidence will show. Did
13 they show a picture to the confidential
14 informant of Mr. Maloy, is this the guy who you
15 purchased drugs from? No. Did they show a
16 picture of Gabriel Johnson, who they believe
17 actually did the sale on the last sale, which
18 was the most important sale right next to the --
19 a search warrant?

20 Did they show him a picture of Mr. Johnson
21 and say, is this the guy you purchased from when
22 the description exactly matches him? No. What
23 are they hiding?

24 Now it would help if they had evidence that
25 he lived there. It would help if there was any

1 investigation whatsoever. They have an FPL
2 bill.

3 This entire case, they say, is an FPL bill.
4 He's paying electricity there so he's
5 responsible for everything that goes on there.
6 Where is the investigation of this FPL bill?
7 Who's the landlord?

8 Who's the owner? Where is the lease?
9 Where is the FPL investigation to show that he
10 doesn't have one, two, three, four, I don't know
11 how many FPL bills he's paying because he's an
12 investor, which if they had -- they had done the
13 most minimum investigation in this case, they
14 would know.

15 Now you heard that there was these six
16 sales at a residence that my client has a deed
17 to and pays an FPL bill at some point within the
18 last nine months.

19 The first sale, the evidence will be that
20 somebody sold four baggies to somebody, to the
21 confidential informant and that they took that
22 into custody and that they never tested it for
23 prints, for DNA, to see who was that person.

24 But even Officer Gill will say, it's
25 definitely not Mr. Maloy. The description does

1 not match Mr. Maloy whatsoever. It's a totally
2 different description.

3 The description is 5'8. Somebody with
4 hair, not basically bald, with very dark hair,
5 5'8. You'll see Officer Gill will say I don't
6 think I know who Maloy is and none of the sales
7 as I understand them, the descriptions match
8 Maloy.

9 So, the first one, 5'8, as it was described
10 by the CI. The second one was two bags on
11 September 14th. You're going to hear the
12 testimony as to that. Not Maloy. Not even
13 Johnson. Some older, black male with braids.
14 Completely different person having evidently
15 nothing to do with this case, not that we will
16 ever know because we never tested any of the
17 bags to find out who that person was.

18 The third sale on September 19th was the
19 same as the first one, the unknown person from
20 the first one. Clearly not Mr. Maloy.

21 The fourth one, again, not Mr. Maloy.
22 Another tall person with low hairstyle. Officer
23 Gill says none of them match the descriptions of
24 Mr. Maloy whatsoever.

25 And same with the last two. Now the sixth

1 one -- oh, no, it was the fifth one, which the
2 seller in that case, according to the
3 confidential informant, is a female. Clearly
4 not my client.

5 And then the sixth one is described as
6 fairly short, full beard, low cut and matches
7 the description of Gabriel Johnson.

8 The defendant is guilty, the co-defendant.
9 Gabriel Johnson said he was guilty, said he
10 would testify on behalf of the co-defendant, say
11 he was guilty. Came to this Court and said he
12 was guilty.

13 And then pled guilty right here yesterday
14 before this case started. That's the guilty
15 party. Now you don't need clue after clue after
16 clue after clue after clue after clue. I've
17 given you in this case here, I've given you the
18 A through J.

19 You have reasonable doubt all over this
20 case. This is a terrible investigation. There
21 is no basis for this case to have been brought
22 whatsoever.

23 This case is not even close beyond and to
24 the exclusion of every reasonable doubt. Now
25 the last thing I'm going to say is the Judge is

1 going to tell you the definition of reasonable
2 doubt is in the most serious of your affairs.

3 Now I know that Ms. Peterson was talking
4 about that in her voir dire. When you make that
5 decision to have surgery or whatever it is, the
6 most serious of your affairs.

7 You have to be that sure, beyond and to the
8 exclusion of every reasonable doubt. And even
9 the instruction says, you have a reasonable
10 doubt. It's one that wavers. Even if you don't
11 have a reasonable doubt, even if you have no
12 reasonable doubt, it's somehow still wavering,
13 still vacillating, still going back -- there's
14 still something not right.

15 This case is not a close case. I'm asking
16 you to listen carefully and when the time comes,
17 go back there and do the right thing. And
18 that's not proven -- not proven beyond a
19 reasonable doubt. Thank you all for your
20 attention.

21 (Thereupon, the excerpt of proceedings concluded at
22 12:15 p.m.; thereupon, the following excerpt of
23 proceedings was heard at 2:06 p.m.)

24 **THE COURT:** Okay. We're back on the record
25 in Mr. Maloy's case. What's the status?

1 **MR. SCHWARTZ:** He needs to be colloquied
2 for the plea. He's not taking it.

3 **THE COURT:** Mr. Maloy, it's my
4 understanding that you were made an offer of
5 five years of probation with the condition that
6 if you complete two and a half years without a
7 violation, you could petition the Court to have
8 that probation terminated early.

9 So, it's two and a half years without
10 violation. It would be up to the Court to make
11 a determination if I wanted to early terminate
12 your probation, even if there were a technical
13 violation.

14 I could still do that. It'd be up to me
15 but it would be at my discretion of whether I
16 could do that or not. I can't tell you what I'm
17 going to do but, you know, after the halfway
18 point, it's up to me.

19 **MR. SCHWARTZ:** Well, since this is silent,
20 I guess it could technically be before that as
21 well. But since it's silent.

22 **THE COURT:** It's -- typically, at the
23 halfway point is when I would consider an early
24 termination. If you violated, though,
25 regardless of what it may be, you'd be facing a,

1 you know, a probation violation hearing with the
2 exposure that you're exposed to.

3 I know as of now, the way that you score,
4 it is a 30-year sentence with a ten-year
5 mandatory.

6 MS. GRANT-CLARKE: That's correct, Your
7 Honor.

8 **THE COURT:** Okay. So, if you -- if you
9 lost at trial --

10 MS. GRANT-CLARKE: No, sorry. He's a GORT
11 Your Honor, no. He's actually a GORT. He's
12 looking at right now a 30-year min man as a
13 GORT. The offer was an HVO, which carries a
14 five-year minimum mandatory.

15 MS. INCE-INGRAM: Correct.

16 **THE COURT:** Okay. So, if you went to trial
17 and you lost --

18 **THE DEFENDANT:** Mm-hm.

19 **THE COURT:** -- I would have no discretion
20 other than to sentence you to 30 years.

21 **MR. SCHWARTZ:** Unless he was not -- after
22 being heard at this hearing found that he was
23 not a present danger. It would have to be a
24 dangerous concern.

25 **THE COURT:** And a violation. I'm talking

1 about at trial. At trial --

2 **MR. SCHWARTZ:** Oh, right.

3 **THE COURT:** -- as it stands, at trial, if
4 the jury came back guilty, then you're looking
5 at 30 years. I -- I have no discretion on that
6 matter. I -- I have no discretion in that
7 matter. So, that's if you lose --

8 **THE DEFENDANT:** Mm-hm.

9 **THE COURT:** -- okay? That's the risk you
10 take going to trial and losing is that mandatory
11 30 years because of your priors.

12 What's being offered to you is supervision.
13 You can leave the Courtroom, be on probation,
14 hopefully not violate. And at the halfway
15 point, come before me and say, listen, I've done
16 two and a half years and I'd like this to
17 terminate.

18 But that's, you know, you're guaranteed
19 today to take the plea, you walk out of here.
20 You go home and you stay out of trouble. If you
21 can do that, there shouldn't be a problem.

22 You run the risk if you stay and go to
23 trial, if you're, you know, does the GORD apply
24 to each felony?

25 **MS. GRANT-CLARKE:** It would be -- just a

1 second, Judge. Yes, Your Honor. Yes, Your
2 Honor. He's enhanced as an HO.

3 **THE COURT:** Okay. So, Mr. Maloy, that
4 would mean is the jury could come back guilty on
5 one of the three charges and you're looking at
6 that 30-year mandatory.

7 You could be acquitted of the cannabis.
8 You could be acquitted of the cocaine. They
9 could find you guilty of the gun -- gun case,
10 it's 30 years. You can be convicted of the
11 cannabis with the not guilty as to the coke or
12 the gun, it's 30 years from the way that this is
13 being explained.

14 If he's enhanced on all --

15 **MR. SCHWARTZ:** The cannabis is what?

16 **MS. GRANT-CLARKE:** Any count that he's
17 found guilty on, the 30-year min man applies.

18 **MR. SCHWARTZ:** On a -- on a third-degree,
19 on a third-degree felony?

20 **MS. GRANT-CLARKE:** Yes.

21 **MS. INCE-INGRAM:** Your Honor, on the third-
22 degree felony, let me just clarify because I did
23 print up the -- what we used in our office. For
24 a third-degree felony, he's looking at a ten-
25 year minimum mandatory. For the second-degree

1 felony, he's looking at the 30-year min man.

2 **THE COURT:** Okay.

3 **MR. SCHWARTZ:** That's fine then.

4 **THE COURT:** All right. So -- so, if you're
5 convicted of the cannabis, it's a mandatory ten.

6 The coke or the firearm, it's a mandatory 30.

7 So, you could win on two and lose on one and
8 still be looking at a minimum of ten years.

9 **MR. SCHWARTZ:** He needs to make a call,
10 Judge. If I can just step out just for a
11 moment, he's got to talk to his dad.

12 **THE COURT:** Is your witness here?

13 **MS. INCE-INGRAM:** Yes, Judge. If I could
14 just have one moment. The witness has just
15 arrived.

16 **THE COURT:** Okay, sure.

17 **MR. SCHWARTZ:** Excuse us. Sorry --.

18 Excuse us, sorry.

19 (Thereupon, Court went off record at 2:11 p.m.;
20 thereupon, the following proceedings were heard at
21 2:12 p.m.)

22 **THE COURT:** Can I see your enhancement
23 notes? Thank you. When you say GORT, you mean
24 VCC, correct?

25 **MS. INCE-INGRAM:** Yes, Your Honor.

1 MS. GRANT-CLARKE: Yes, Your Honor.

2 Violent career criminal.

3 MS. INCE-INGRAM: And Your Honor, I also
4 have the Florida statute under the -- the
5 violent criminal.

6 **THE COURT:** It's 084(D), correct?

7 MS. INCE-INGRAM: Yes, sir.

8 **THE COURT:** Okay. What are Mr. Maloy's
9 priors that would qualify him under sub D?

10 MS. GRANT-CLARKE: In 2007, he pled to
11 second-degree murder. He was convicted in 2012
12 and spent eight years. And I can pass up his
13 priors here.

14 **THE COURT:** Ray, can you just go check on
15 them? I'd like to --

16 **THE BAILIFF:** Sure.

17 **THE COURT:** -- get this moving one way or
18 the other. Ray, I think they're outside.

19 **THE BAILIFF:** Oh.

20 **THE COURT:** They went to go make a phone
21 call.

22 **THE BAILIFF:** They're there?

23 **THE COURT:** Yeah.

24 **MR. SCHWARTZ:** In a moment, I'm going to
25 leave you with Valentina regardless of what

1 happens right now.

2 **THE DEFENDANT:** What?

3 **MR. SCHWARTZ:** I'm going to leave you with
4 Valentino regardless of what happens right now.

5 **THE DEFENDANT:** Okay.

6 **MR. SCHWARTZ:** I've got too much to do for
7 jury tomorrow. I've got other clients in my
8 life. You know those thing --

9 **THE COURT:** All right. Did we come to any
10 conclusion, Mr. Maloy?

11 **THE DEFENDANT:** What you said?

12 **THE COURT:** Do you want to take the offer?

13 **THE DEFENDANT:** Okay.

14 **THE COURT:** I want you to raise your right
15 hand.

16 **THE CLERK:** Do you solemnly swear the
17 testimony you're about to give will be the
18 truth, the whole truth and nothing but the
19 truth?

20 **THE DEFENDANT:** Yes.

21 **THE COURT:** Mr. Maloy, I need you to speak
22 up so I can hear you. We're in trial. We've
23 been here on F1621853. You know you're charged
24 with counts two, three and four of the
25 information, possession of cannabis with the

1 intent to deliver, a third-degree felony,
2 possession of cocaine with intent to deliver, a
3 second-degree felony, and possession of firearm
4 by a convicted felon, a second-degree felony.

5 As it stands, I advised you as I went
6 through the statute again, had you been
7 convicted as to count two, I would have no
8 choice but to sentence you to ten years as a
9 mandatory violent career criminal or 30 years
10 with regards to counts three or four.

11 The offer that's been made to you by the
12 State of Florida is five years of probation to
13 counts two, three and four to run concurrent. I
14 said that I would entertain an early termination
15 at the halfway mark.

16 You'll be sentenced as a HVO, which is a
17 habitual violent offender. Is that your
18 understanding as to how this is going to
19 resolve?

20 **THE DEFENDANT:** Yes.

21 **THE COURT:** Okay. Understand that we are
22 in trial at this point and you do have the right
23 to have this trial conclude with Mr. Schwartz
24 representing you and the State having proving
25 you guilty beyond a reasonable doubt.

1 You understand you're waiving that right --

2 **THE DEFENDANT:** Yes.

3 **THE COURT:** -- at this point?

4 **THE DEFENDANT:** Yes.

5 **THE COURT:** There will be no trial. You
6 understand that?

7 **THE DEFENDANT:** Yes.

8 **THE COURT:** It's going to end.

9 **THE DEFENDANT:** Yeah.

10 **THE COURT:** You understand that?

11 **THE DEFENDANT:** I do.

12 **THE COURT:** And you've spoken about this
13 with Mr. Schwartz?

14 **THE DEFENDANT:** Yes.

15 **THE COURT:** And you're satisfied with the
16 work he's done on your case?

17 **THE DEFENDANT:** Yes.

18 **THE COURT:** Realize that the work will end
19 today. He will do no further work after today.
20 Do you understand that?

21 **THE DEFENDANT:** Yes.

22 **THE COURT:** Okay. Is anyone forcing you --

23 **THE REPORTER:** Sir, I need -- I need you --
24 sorry, I need you --

25 **THE DEFENDANT:** Yes.

1 **THE COURT:** Okay. Is anyone forcing you to
2 make this decision?

3 **THE DEFENDANT:** No.

4 **THE COURT:** You're doing this on your own
5 free will?

6 **THE DEFENDANT:** Yes.

7 **THE COURT:** And having talked to Mr.
8 Schwartz, also, correct?

9 **THE DEFENDANT:** Yes.

10 **THE COURT:** And you've accepted the advice
11 of your counsel, correct?

12 **THE DEFENDANT:** Yes.

13 **THE COURT:** No complaints about the work
14 he's done, correct?

15 **THE DEFENDANT:** No.

16 **THE COURT:** Are you thinking clearly today?

17 **THE DEFENDANT:** Yes.

18 **THE COURT:** Okay. Nothing interfering with
19 your decision, be it mental illness, drugs,
20 alcohol, prescription medication?

21 **THE DEFENDANT:** No.

22 **THE COURT:** I have to ask everybody.

23 **THE DEFENDANT:** I'm going to need 40 days
24 to clean out my system.

25 **THE COURT:** Well, I'm just asking if

1 anything is interfering with your --

2 **THE DEFENDANT:** Oh, no, no.

3 **THE COURT:** -- decision-making.

4 **THE DEFENDANT:** No, not right now.

5 **THE COURT:** Okay. Okay. Understand when
6 you're on probation, there are rules and
7 regulations to follow. You'll be drug tested.
8 You know, you can't violate the law. If you
9 violate the law or violate the rules of
10 probation, you're looking at this time that
11 you're looking at today. Do you understand
12 that?

13 **THE DEFENDANT:** Yes.

14 **THE COURT:** You understand that?

15 **THE DEFENDANT:** Yes.

16 **THE COURT:** So, there's significant prison
17 time in the event that you violate probation.
18 Do you understand that?

19 **THE DEFENDANT:** Yes.

20 **THE COURT:** Okay. The Court is well
21 familiar with the facts and circumstances of
22 this case. State, are you aware of any DNA
23 evidence that would exonerate Mr. Maloy?

24 MS. GRANT-CLARKE: No, Your Honor.

25 **THE COURT:** Mr. Schwartz?

1 **MR. SCHWARTZ:** No, Judge.

2 **THE COURT:** Okay. Mr. Maloy, understand
3 that if you're not a citizen of the United
4 States, taking this plea subjects you to removal
5 from the United States. Do you understand that,
6 also?

7 **THE DEFENDANT:** Yes.

8 **THE COURT:** And you've discussed that with
9 Mr. Schwartz?

10 **THE DEFENDANT:** Yes.

11 **THE COURT:** Okay. To counts two, three and
12 four of the information filed in F1621853, are
13 you entering pleas of guilty to those offenses?

14 **THE DEFENDANT:** Yes.

15 **THE COURT:** I accept those pleas of guilty.
16 I find they're freely and voluntarily made
17 pursuant to the negotiations. You're
18 adjudicated guilty of counts two, three and
19 four, placed on five years of reporting
20 probation.

21 We're going to withhold any drug testing
22 for 45 days. You're going to have to come back
23 tomorrow to sign up for probation.

24 **THE DEFENDANT:** Okay.

25 **THE COURT:** Okay?

1 **THE DEFENDANT:** All right.

2 **THE COURT:** So, you'll come back tomorrow.
3 We'll have a probation officer here and you'll
4 sign up. Do you understand that?

5 **THE DEFENDANT:** Okay.

6 **THE COURT:** Okay. There are Court costs
7 you're going to have to pay. Those will come
8 due --

9 **THE DEFENDANT:** How much I'm going to have
10 to pay?

11 **MR. SCHWARTZ:** Five hundred --

12 **THE DEFENDANT:** I am?

13 **MR. SCHWARTZ:** I'm not -- no crime is --.

14 **THE DEFENDANT:** Oh.

15 **MR. SCHWARTZ:** -- you'll have at least over
16 a year.

17 **THE DEFENDANT:** Oh.

18 **THE COURT:** You have well over a year to
19 pay your Court costs. All right? I'm going to
20 reduce your costs of supervision to \$25 per
21 month. Okay? State, you are seeking
22 designation as an HVO?

23 **MS. GRANT-CLARKE:** Yes, Your Honor.

24 **THE COURT:** Mr. Maloy, you're going to have
25 to answer a couple of questions truthfully when

1 the prosecutors ask you.

2 MS. GRANT-CLARKE: In case F07008249B, were
3 you convicted of second-degree felony murder --
4 I'm sorry, felony in the second degree on
5 January 20th, 2012 and spent eight years in
6 prison?

7 **THE DEFENDANT:** Yes.

8 MS. GRANT-CLARKE: And in case F0200827A,
9 were you convicted of burglary of an occupied --
10 unoccupied structure and convicted on August
11 8th, 2002 and spent 364 days in jail?

12 **THE DEFENDANT:** Yes.

13 MS. GRANT-CLARKE: Thank you, Your Honor.

14 **THE COURT:** Based upon the testimony of Mr.
15 Maloy, the Court does find that he qualifies to
16 be sentenced as a habitual felony offender and
17 he'll be designated as such.

18 That being said, Mr. Maloy, we're done.
19 You're going to report to probation back here
20 tomorrow. You'll be instructed by probation
21 tomorrow. We'll take care of all that. He'll
22 be fingerprinted today. Anything else that I'm
23 forgetting?

24 **MR. SCHWARTZ:** No, ah, no. What to do,
25 Judge, with these orders here recommending

1 hardship after a drug conviction? Do you have a
2 standard order for that?

3 **THE COURT:** I do not have a standard order.
4 If he's seeking his license after a conviction,
5 I believe it's about six months. He then can
6 apply for a hardship license.

7 **MR. SCHWARTZ:** I know there's -- there's a
8 -- there's a new statute which he can sign an
9 order and he can get a hardship order and --

10 **THE COURT:** If you want to provide me a
11 statute and a proposed order --

12 **MR. SCHWARTZ:** Yeah.

13 **THE COURT:** -- then I'd be happy to take a
14 look at it.

15 **MR. SCHWARTZ:** Right.

16 **THE COURT:** Okay. That being said, Mr.
17 Maloy, we're through. Thank your lawyers and
18 the State. Everyone worked very hard to get to
19 where we are today.

20 **MR. SCHWARTZ:** Thanks. So, 9:00 tomorrow
21 morning?

22 **THE COURT:** Yeah, sometime between 9:00 and
23 10:00 tomorrow morning while the probation
24 officer's here.

25 **MR. SCHWARTZ:** Does she -- does he need to

1 do prints?

2 **THE COURT:** Yes. We're going to do --

3 **MR. SCHWARTZ:** Okay.

4 **THE COURT:** -- prints now.

5 **MR. SCHWARTZ:** So, just take --

6 **CORRECTIONS:** They can call a probation
7 officer --

8 **THE COURT:** Wait, hold on.

9 **CORRECTIONS:** -- and if they are here,
10 maybe they can do it now.

11 **THE COURT:** If you sit tight, we may have
12 probation come down now to do it so you don't
13 have to come back.

14 **MR. SCHWARTZ:** Yeah, okay. So, just take a
15 seat in that. Here. Oh, you've got to get your
16 stuff.

17 **THE COURT:** Ray, if you want to congregate
18 the jury down at the far end and I'll come talk
19 to them.

20 **THE BAILIFF:** Yes, sir.

21 **MR. SCHWARTZ:** Is there any chance we can
22 be excused or you want us to stay for the --

23 **THE COURT:** You're excused.

24

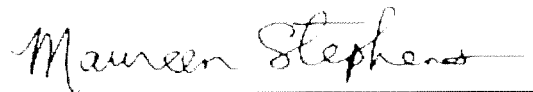
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(Thereupon, the proceedings concluded at 2:34
p.m.)

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, knowledge and belief.



Maureen Stephens, Transcriber

September 14, 2019

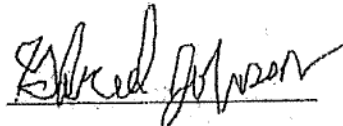
SWORN AFFIDAVIT OF GABRIEL JOHNSON

I, Gabriel Johnson, am of sound mind. I am not under the influence of any mind-altering substances. I am not being coerced or threatened in any way to make this statement. This is my voluntary and true statement. Under penalties of perjury, I declare that I have read the foregoing and that the facts stated in it are true.

1. My name is Gabriel Antwan Johnson. I am 37 years old. I am a defendant in State of Florida v. Gabriel Johnson, case number F18-21853B, in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. I am charged with possession of cocaine with intent to sell or deliver.
2. I am presently represented by Dustin Tischler. Before I was represented by Mr. Tischler I was represented by the Miami-Dade Public Defender's Office.
3. My codefendant is Demarris Gregory Maloy, who is represented by Jonathan Schwartz. I have known Mr. Maloy for many years.
4. On June 12, 2018, I went to Mr. Schwartz's office with my codefendant, Mr. Maloy. I had previously told Mr. Maloy that I wanted to testify on his behalf in our case.
5. When I saw Mr. Schwartz, he told me that he could not speak with me because I was represented by counsel and that I should call my lawyer. I told Mr. Schwartz that I was represented by a public defender, but that every time I saw or talked with my lawyer it was a different person. I was unhappy with my representation and wanted to fire my lawyer.
6. I told Mr. Schwartz that I wanted to testify on behalf of Mr. Maloy. We did not talk about the specific facts of the case or what happened.

FURTHER AFFIANT SAYETH NAUGHT

DATED this October 3, 2018



Gabriel Antwan Johnson

STATE OF FLORIDA

COUNTY OF MIAMI-DADE

The foregoing instrument was acknowledged before me this October 3, 2018 who produced identification.


Notary Signature



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

FELONY DIVISION

STATE OF FLORIDA,
Plaintiff,

vs.

**CASE NO.: F16-21853A
DIVISION: F006
JUDGE: SPENCER MULTACK**

DEMARRIS GREGORY MALOY,
Defendant.

MOTION FOR PRETRIAL RULING ON CO-DEFENDANT'S ADMISSSION

COMES NOW, the Defendant, **DEMARRIS GREGORY MALOY**, by and through undersigned counsel, hereby moves this Honorable Court to enter its order on the admissibility of the co-defendants admission made under oath. In support thereof, Defendant states as follows:

1. Co-defendant, Gabrielle Johnson, signed a *Byrd* affidavit, stating that if Mr. Maloy's trial was severed and held after his trial he would testify for Mr. Maloy. Mr. Johnson's testimony would be exculpatory in nature.
2. On July 19, 2018, a hearing was held to determine if severance would be granted. Mr. Maloy's request for severance and a subsequent trial was denied.
3. At said hearing, Mr. Johnson stated under oath that if he were to testify at Mr. Maloy's trial then Mr. Johnson would say the drugs were his and not Mr. Maloy's drugs.
4. The undersigned is requesting the court make a pretrial ruling on the admissibility of said admission.
5. Co-defendant's admission is admissible under Fla. Stat. Ann. § 90.804 (West) and any additional basis to be argued at the hearing.

WHEREFORE, the Defendant, **DEMARRIS GREGORY MALOY**, respectfully requests this Honorable Court grant this motion and enter an order on the admissibility of the co-defendants admission made under oath.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court and delivered to the State Attorney's Office, Felony Division, felonyservice@miamisao.com, and ASA Daniel Walsh, Esq., danielwalsh@miamisao.com, on this 30th day of July 2018.

Respectfully submitted,

SCHWARTZ & ASSOCIATES
200 Southeast 1st Street | Suite 505
Miami, Florida 33131
Tel: 305.523.2250 | Fax: 305.523.2231

BY: /s/ Jonathan S. Schwartz
Jonathan S. Schwartz, Esq.
Florida Bar Number 579361
jsslaw@hotmail.com

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 1st day of June, 2022 to:

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/s/ Chris W. Altenbernd

Chris W. Altenbernd, Esq.