

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

**THE FLORIDA BAR,
Complainant,**

v.

**JONATHAN STEPHEN SCHWARTZ,
Respondent.**

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

**REPLY BRIEF ON CROSS-APPEAL OF RESPONDENT JONATHAN
STEPHEN SCHWARTZ**

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SYMBOLS AND REFERENCES

The following abbreviations and symbols appear in this brief:

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

ARGUMENT ON CROSS-APPEAL

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

The entirety of the Bar's opposition to Respondent's evidentiary insufficiency argument is summarized in its position at page 18 of its Reply and Cross-Answer Brief that "Mr. Schwartz had to know ..." ¹

The Bar explained its argument as follows (RCA 18):

Frankly, Mr. Schwartz had to know that any lawyer representing Mr. Johnson that was providing effective assistance of counsel would know the scheme was not in Mr. Johnson's best interests. All but the most inexperienced of public defenders would have realized that double jeopardy would be no protection for Mr. Johnson when he did not take the Fifth Amendment at the second trial.

Yet, this argument does not square with the Referee's factually supported finding that 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)." (ROR 3, p. 4). The unexpected and unscheduled appearance of Mr. Johnson and his insistence he would help his best friend, without obtaining any

¹ Criticizing Mr. Schwartz's "years of experience as a criminal defense attorney, including experience as a public defender," the Bar attempts to hold Respondent responsible for the Bar's self-identified criminal defense strategy that is not supported by either the record evidence or legal authority (RCA 6).

guidance from counsel reasonably led Respondent to take non-intrusive steps to protect Mr. Johnson as a witness and develop an important strategic opportunity for both Mr. Johnson and Respondent's client (Mr. Maloy) as codefendants.

Respondent, relying on his admittedly extensive criminal defense experience and his familiarity with the requirements of Rule 4-4.2(a) restricting communications with represented persons, reasonably and in good faith believed the situation allowed him to obtain a generalized, non-incriminating *Byrd* affidavit from his client's codefendant and best friend (T2 146-148; T3 18). Respondent testified he was familiar with the *Decker* precedent at the time of his involvement with Mr. Johnson's *Byrd* affidavit (T2 178; T3 19-22).²

Respondent's scope of knowledge and understanding is hardly unusual, as expert witness Juan De Jesus Gonzalez explained that the criminal defense community is readily aware of the contours of represented party communications, and that *Decker* is "the most

² The Court should disregard the Bar's incorrect and record-contrary assertion that Respondent "did not actually testify that he had even read the [*Decker*] opinion prior to that time." (RCA p. 4). Respondent was clear and unequivocal that he knew and understood the *Decker* precedent when arranging Mr. Johnson's affidavit. So clear was this fact that the Bar did not even challenge at trial that Respondent was familiar with *Decker*.

important case in that regard ...” (T2 90-95). As expert Gonzalez explained, the rule involving communication with a represented person is a “tricky area” (T2 96) that often requires the exercise of lawyer judgment in navigating the rule (T2 96-97). This record reflects Respondent used his best efforts to exercise his judgment in a manner that protected his own client and did not subject Mr. Johnson to any legal liability.

With his practical understanding of *Decker*, Respondent believed in good faith that Mr. Johnson’s choice of counsel was his own to make, with neither guidance nor suggestions from Respondent. In this regard, the communication rule does not require any different analysis in the civil versus criminal context, nor should it. A criminal defendant’s constitutional right to counsel does not alter that individual’s ability to decide on a choice of counsel or know whether his or her legal interests are being represented by appointed counsel who had no relationship with him, as Mr. Johnson testified to Judge Multack (TFB Ex 2, p. 14; App. 58). Nor is Respondent obligated to ignore the directive of the potential witness.

The Bar argues that Respondent had a duty to call the Office of the Public Defender (RCA p. 3) despite Mr. Johnson making clear to

Respondent that he had no intention of doing so and not giving Respondent permission to communicate with someone Mr. Johnson insisted was not representing him (TFB Ex 2, p. 14). So informed, Respondent took a course of action that did not involve any substantive communication about the facts or circumstances of Mr. Johnson's case, and only inquired whether Mr. Johnson chose on his own to be a witness in his codefendant's separate case. Respondent's suggestion that Mr. Johnson should first consult with his lawyer in no way implicated the subject of the representation, and Respondent had no other case-impacting communication.

By hewing closely to the severance question, Respondent studiously avoided any "subject of the representation" discussion with Mr. Johnson, even if Johnson's position regarding counsel could be considered unclear. In this way, Respondent carefully balanced the "subject of the representation" prohibition with his obligation to secure compliance with the severance rule to further a constitutional prerogative authorized by *Byrd v. Wainright*, 428 F.2d 1017 (5th Cir. 1970).

Respondent immediately filed Mr. Johnson's affidavit and the severance motion on the public record through the e-Filing portal, a

filing that even the Assistant Public Defender acknowledged automatically served all counsel of record (T1 78-79). Mr. Schwartz understood that constituted *de facto* and *de jure* notice (T2 152-153, 174-175; T3 6-9). His purposeful course of action exemplifies Respondent's good faith application of Rule 4-4.2.

As for the Bar's argument that *Decker* is a materially different case that provides no support for Respondent's decision-making (RCA p. 4-6), the criminal defense community does not construe it that way, instead viewing *Decker* as "the most important case" providing guidance to defense counsel when applying the communication with a represented party rule in the everyday criminal law context (T2 90-95).

The Bar argues that Respondent should have known and recognized that Johnson was represented by appointed counsel, and that Respondent had an obligation to consult with appointed counsel (RCA p. 2-3) in advance of Mr. Johnson completing the *Byrd* affidavit. But as Respondent understood *Decker*, he reasonably believed Mr. Johnson was either unrepresented or intended to engage his own lawyer, and that Johnson affirmatively wanted to proceed to assist his friend and codefendant, Respondent's client.

The status of the two men as codefendants does not, contrary to the Bar's argument (RCA p. 11-15), alter Respondent's obligation under the represented person rule. Mr. Johnson led Respondent reasonably to understand that he was not receiving any actual representation, and that Johnson's decision to help his codefendant without exposing himself to jeopardy was genuine. Respondent did not inquire of Mr. Johnson what his involvement in the charged events was or what his testimony would be, as he explained to Circuit Judge Multack, inferring at the time without waiving any attorney-client confidentiality that his good faith understanding came from his own client (TFB Ex 2, p. 10).

At no point did Respondent give "Mr. Johnson legal advice about how to defend that case." (RCA p. 10). And the severance was undeniably beneficial to both Respondent's client and Mr. Johnson, as later events confirmed when Mr. Johnson's retained lawyer secured a favorable case resolution based in part on the *Byrd* affidavit (ROR ¶30; T2 148-150). The Bar's hypothetical "double jeopardy" argument notwithstanding (RCA p. 11-15), nothing about the non-factual *Byrd* affidavit subjected Mr. Johnson to any jeopardy, yet affirmatively minimized his criminal exposure by

enabling him to resolve his case first. *See* Rule 3.151(c), Florida Rules of Criminal Procedure (dismissal of related offenses after trial); *Brown v. State*, 251 So. 3d 973, 975 (Fla. 1st DCA 2018) (“The rule is intended to ‘protect defendants from successive prosecutions based upon essentially the same conduct.’”).

On the whole of the record evidence, the Bar’s Rule 4-4.2 violation was not proved by clear and convincing evidence. Absent any violation of the communication with a represented person rule, there is no clear and compelling evidence justifying the Rule 4-8.4(d) charge of conduct prejudicial to the administration of justice.

CONCLUSION

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

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies this document complies with the font and word count requirements of Rules 9.045 and 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure. The font type is 14-point Bookman Old Style. The word count is 1,236 words as counted by Microsoft Word.

Respectfully submitted,

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I HEREBY CERTIFY that the document has been furnished December 5, 2022, via the State of Florida's e-Filing Portal, to: Chris W. Altenbernd, service-caltenbernd@bankerlopez.com, Rita Florez, Bar Counsel, The Florida Bar, rflorez@floridabar.org; Patricia Ann Savitz, Staff Counsel, The Florida Bar, psavitz@floridabar.org; Barry Wax, barry@barrywax.com.

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