IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CHRISTOPHER W. CROWLEY,

Respondent.
_____/

Supreme Court Case
No. SC20-529

The Florida Bar File
No. 2019-10,070 (12B)
2019-10,148 (12B)

RESPONDENT'S MOTION TO RECONSIDER AND VACATE FINDINGS OF REFEREE DUE TO SUBSEQUENT AUTHORITY FROM U.S. SUPREME COURT

COMES NOW, Respondent, Christopher W. Crowley, by and through undersigned counsel, and moves to reconsider and vacate Referee Maria Ruhl's findings noted in her Report dated March 19, 2021 ("Report") based on subsequent authority from the U.S. Supreme Court.

Recently, on June 27, 2023, while the proceedings in this case were stayed,[1] the U.S. Supreme Court issued its decision in Counterman v. Colorado, 600 U.S. 66, 143 S.Ct. 2106, 216 L.Ed.2d 775 (2023) which sets

[1] See "Order Granting Respondent's Renewed Motion For Continuance and Stay of Proceedings," November 9, 2022 (ordering that the "matter is hereby STAYED for a period of four hundred (400) days, beginning October 1, 2022," which would be until November 6, 2023).

forth the subjective *mens rea* standards that the government must prove for penalizing speech. The Court made clear that it is a violation of the U.S. Constitution's First Amendment to penalize speech based solely on an objective or negligence standard without proof from the government of a more culpable, subjective *mens rea* of the speaker: "the State must show that the [speaker] consciously disregarded a substantial risk." See id., 600 U.S. at 69, 79 n.5, 82 (holding that the subjective recklessness standard required for penalizing defamatory statements is the same standard required for penalizing true threats in a stalking case).[2]

This decision by the U.S. Supreme Court directly contradicts the reasoning and analysis in the Report that

> [Crowley's] view, opinion and personal thoughts are *irrelevant* when considering Rule 4-8.2(a). The fact that Respondent genuinely believed in his statements about Ms. Fox does not preclude the finding that he acted with reckless disregard of the falsity of the statements, *when considered under an objective standard*.

[2] In so far as this violates the First Amendment to the U.S. Constitution, it violates Section 4 of Article 1 in the Florida Constitution, which states: "Every person may speak, write and publish sentiments *on all subjects* but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press" (emphasis added). Dep't of Educ. v. Lewis, 416 So.2d 455, 461 (Fla. 1982) ("The scope of the protection accorded to freedom of expression in Florida under article I, section 4 is the same as is required under the First Amendment," and therefore Florida courts "must apply the principles of freedom of expression as announced in the decisions of the Supreme Court of the United States.").

(Report at 22 (emphasis added).) This unconstitutional objective standard analysis, which disregards Crowley's personal thoughts and genuine beliefs, was the basis in the Report for finding Crowley to be in violation of Rules Regulating The Florida Bar 4-8.2(a) and 3-4.3.[3]

Protecting and allowing "truthful reputation-damaging statements about public officials and figures" is a "central concern" of the First Amendment. Counterman, 600 U.S. at 81. "[A]n important tool…to stop people from steering wide of the unlawful zone" into self-censoring protected speech "is *to condition liability on the State's showing of a culpable mental state*." Id. at 75 (emphasis added) (cleaned up). Making the government prove a heightened subjective mental state of recklessness is thus required to avoid a chilling effect and to provide "breathing room" to protect this valuable speech. See id. at 75, 82.

[3] As the Report vaguely and conclusively found the violation of Bar Rule 3-4.3 to be based on "[Crowley's] conduct towards Ms. Fox during his campaign, which were alleged in the Bar's complaint and proven during the final hearing," without any separate reasoning or basis being given (Report 24-26), the arguments requiring reversal of the Report's finding of a violation of Bar Rule 4-8.2(a) fully apply to and require reversal of the Report's finding of a violation of Bar Rule 3-4.3 as well.

In requiring a subjective recklessness standard to maintain such breathing room, the U.S. Supreme Court has previously held that if a person has spoken

> the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice…. Moreover, *even where the utterance is false*, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any *except the knowing or reckless falsehood*.

Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (finding that a district attorney's criticism of eight judges was protected by the First Amendment from punishment under a criminal defamation statute which did not apply the subjective recklessness standard) (emphasis added) (internal quotation marks omitted).

The Court further explained that

> since erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the breathing space that they need to survive, *only those false statements made with the high degree of awareness of their probable falsity* demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement,

> caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Garrison, 379 U.S. at 74-75 (emphasis added).

Even though a State might have "an interest in protecting the good repute of its judges, like that of all other public officials," the U.S. Supreme Court has "firmly established…that injury to official reputation is an insufficient reason for suppressing speech that would otherwise be free," and even "the institutional reputation of the courts…is entitled to no greater weight in the constitutional scales." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842 (1978). The Court made clear in Counterman that the First Amendment will not tolerate tipping the constitutional scales in favor of the State by excusing the State from proving a speaker's subjective recklessness to penalize defamatory speech of a public official or figure—even a public legal officer or candidate—when doing so would not allow "uninhibited, robust, and wide-open" debate on public issues.

Therefore, because "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned," Garrison, 379 U.S. at 74, it is the Bar's burden to first prove that a statement is false and outside of the First Amendment's core protections, and then further prove that the speaker had the requisite subjective *mens*

rea or culpability in making the false statement and was thus outside the First Amendment's breathing space protections. See Counterman, 600 U.S. at 69, 80, 82. The Bar failed to meet that burden in this case and the previous Referee failed to require it.

The Election Context

The breathing space and heightened protection of speech described by Counterman is particularly strong in the election context, which is what this case involves. The U.S. Supreme Court has observed that "debate" and "speech about the qualifications of candidates for public office" is "at the core of our electoral process and of the First Amendment freedoms, not at the edges." Republican Party of Minnesota v. White, 536 U.S. 765, 774, 781 (2002) (cleaned up). Thus, the U.S. Supreme Court has "never allowed the government to prohibit candidates from communicating relevant information to voters during an election." Id. at 782.

As an example from another state involving the same rule as 4-8.2(a), the Court of Appeals of Maryland noted that "any interpretation of [Rule 4-8.2(a)] in an election context must take into account the First Amendment protections for speech in election campaigns," and "there inevitably is some imprecision in language used during the heat of a

political campaign," which "is not necessarily a violation of [Rule 8-4.2(a)]" as the rule "does not require absolute precision in the expression of political speech as part of an election campaign." Attorney Grievance Comm'n of Md. v. Stanalonis, 126 A.3d 6, 13, 15 (Md. App. 2015). The Maryland court observed that "[t]he drafters of the model rule from which [Rule 4-8.2(a)] is derived apparently intended to import [the New York Times subjective] test into the rule." Id. at 14 (citing American Bar Association, Model Rules of Professional Conduct, Proposed Final Draft (May 30, 1981) at 206 ("explaining that Model Rule 8.2 is consistent with the New York Times standard")).

While the Maryland court did not rule on whether a subjective or objective test was required—an issue which has now been made abundantly clear by the U.S. Supreme Court in Counterman—it found that, in a "hotly-contested primary [judicial] campaign," an attorney's false statement in a campaign flyer that his opponent (who was a current judge) "opposes registration of convicted sexual predators" did not satisfy the subjective test for reckless disregard. Stanalonis, 126 A.3d at 15. The Maryland court therefore rejected the conclusion of the disciplinary hearing judge that the attorney's false statement violated Maryland's version of

Rule 4-8.2(a) and dismissed the petition against the attorney because, "according to [the attorney's] testimony" at the disciplinary hearing, he "appear[ed] to have actually believed" his statement and "[t]here was no evidence that [the attorney] entertained serious doubts as to the truth of his statement." Id. at 9, 15-16. Such is the evidence in this case as well, and thus under the subjective standard required by Counterman, Crowley should not be found in violation of Bar Rules 4-8.2(a) or 3-4.3.

Additionally, subsequent to the previous referee's Report in this case, the Fourth Circuit Court of Appeals held that a North Carolina law, which is similar to Rule 4-8.2(a), was facially unconstitutional. Grimmett v. Freeman, 59 F.4th 689 (4th Cir. 2023). The North Carolina law made it a crime

> [f]or any person to publish or cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election.

Id. at 691 (quoting N.C. Gen. Stat. § 163-274(a)(9)). During a campaign for North Carolina's attorney general, one candidate broadcast an ad criticizing the other candidate's handling of 1,500 untested rape kits. Id.

The Fourth Circuit found the law unconstitutionally overbroad because it "criminalizes truthful derogatory statements so long as the

speaker acts in reckless disregard of a statement's truth or falsity," id. at 692, contrary to the U.S. Supreme Court's "constitutional rule that absolutely prohibits punishment of truthful criticism even when such criticism is made with ill will or actual malice," id. at 694 (cleaned up).

The Fourth Circuit additionally found the law to be facially unconstitutional because, even if it reached only false statements, it was underinclusive as it only regulated statements critical of political candidates and thus "prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses," which "is textbook content discrimination." Id. at 694. The Fourth Circuit explained that "the Act's careful limitation to only a subset of derogatory statements to which elected officials may be particularly hostile—those harmful to their own political prospects—raises the 'possibility that official suppression of ideas is afoot.'" Id. at 695-96 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992)).

The Fourth Circuit further noted that "the justification the [State] offers to support the Act's content discrimination (preventing campaign fraud and protecting election integrity) is of a different kind, not degree, than the reputation-based justifications underlying libel laws," and thus the law's different purpose was not cause for a different First Amendment standard

to apply, nor did the law's purpose satisfy the First Amendment's requirements. Id. at 695.

In the present case, to apply a different First Amendment standard than subjective recklessness and find Crowley in violation of Bar Rules 4-8.2(a) and 3-4.3, the Report relied on the holdings in The Florida Bar v. Ray, 797 So.2d 556, 558-59 & n.3 (Fla. 2001) and The Florida Bar v. Patterson, 257 So.3d 56, 62 (Fla. 2018) that "the applicable standard under the rule [4-8.2(a)] is not whether the statement is false, but whether the lawyer had an objectively reasonable factual basis for making the statement. The burden is on the lawyer who made the statement to produce a factual basis to support the statement." (Report at 20 (quoting Patterson, 257 So.3d at 62 (internal citation omitted)).)

The Report applied Ray "to lawyers who make statements about candidates for legal office," even though the Report conceded that Ray "did not specifically address campaign speech." (Report at 21.) Indeed, Ray involved letters to a Chief Immigration Judge questioning the veracity, integrity, and fairness of an administrative law judge by making "outrageously false accusations." 797 So.2d at 557-58. Likewise, Patterson involved a letter to a judge and court filings, arguing bias and favoritism of

judges, by an attorney who had been sanctioned to pay attorneys' fees. 257 So.3d at 59, 62-63. Thus, the Florida Supreme Court did not consider Bar Rule 4-8.2(a)'s application in the very different and important election context which this case presents.

In Ray, the Florida Supreme Court acknowledged that "the language of rule 4-8.2(a) closely tracks the subjective 'actual malice' standard of New York Times [v. Sullivan, 376 U.S. 254, 280 (1964)]," but "conclude[d] that a purely subjective New York Times standard is inappropriate in attorney disciplinary actions" because the rule is "designed to preserve public confidence in the fairness and impartiality of our system of justice." Ray, 797 So.2d at 558-59.

However, as explained above, the Florida Supreme Court's statement about losing "public confidence in the fairness and impartiality of our system of justice" was made in the context of "outrageously false accusations" questioning a judge's veracity, integrity, and fairness—not speech against a political opponent in a campaign. Id. at 557-59. And, regardless of the different context from this case, the Florida Supreme Court's justification for Bar Rule 4-8.2(a) being different than the purpose for a defamation action to remedy a private wrong makes no difference in

terms of the First Amendment's protections for the same speech because the justification for the rule is merely "of a different kind, not degree." See Grimmett, 59 F.4th at 695 (citing Rosenblatt v. Baer, 383 U.S. 75, 86 (1966); Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974)).

In the Bar's November 1, 2023 "Response to Respondent's Motion for Summary Judgment" ("Bar Response") the Bar attempts to brush aside such First Amendment concerns by analogizing this matter to another case involving a categorically different type of speech, which has a justification "of a different [degree], not [kind]." The Bar seeks support from Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), but the Bar fails to explain and recognize the very narrow context in which Gentile applies. (Bar Response at 11-12.)

Gentile involved an attorney being disciplined after the state Bar filed a complaint against him for holding a press conference about a pending case in which he represented a criminal defendant. 501 U.S. at 1033, 1062. The U.S. Supreme Court was heavily split on different issues, having a majority only in parts of two separate opinions, but reversed the Supreme Court of Nevada's discipline against the attorney because the ethics rule was void for vagueness, which raised concerns of discriminatory

enforcement, especially when the speech was critical of the government. Id. at 1048-51, 1058.

Separate from the determinative issue, and thus *dicta* in a dissenting opinion (though with a majority as to certain parts), a majority of the Court concluded that "a lawyer *who represents a defendant involved with the criminal justice system*" may be penalized "*for public pronouncements about the case*" on a lesser standard than what is required to prohibit speech or publication of pending cases by the general media. Id. at 1070-71, 1075 (Rehnquist, C.J., dissenting) (emphasis added). It is this part of the dissenting opinion to which the Bar cites. (Bar Response at 11-12.) But even this dissenting opinion does not support the Bar's broad assertion that "the U.S. Supreme Court noted that lawyers are not protected by the First Amendment to the same extent as the general public" because "when lawyers…make statements attacking the judiciary or legal officers (or candidates of those positions) without an objectively reasonable basis for doing so, it unfairly undermines public confidence in the administration of justice." (Bar Response at 11.) Indeed, the Court never says that "lawyers are not protected by the First Amendment to the same extent as the general public" in every respect, and Gentile had nothing to do with

"statements attacking the judiciary or legal officers," nor anything to do with a statement which "unfairly undermines public confidence in the administration of justice."

The Bar claims "the Court in Gentile noted, *lawyers are key participants in our system of justice*, and 'the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct.'" (Bar Response at 12 (quoting Gentile, 501 U.S. at 1074 (Rehnquist, C.J., dissenting) (emphasis added).) But the Bar fails to accurately characterize the Court's wording and context in the emphasized portion of the quote above—what the Court actually said was: "Lawyers *representing clients in pending cases* are key participants in *the criminal justice system*, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." Gentile, 501 U.S. at 1074 (Rehnquist, C.J., dissenting) (emphasis added). The emphasized portions of that quote are what the Bar left out in its own wording or paraphrase, but those portions make a significant difference.

Crowley's statements did not involve the pending criminal case of a client. The Court explained that speech by an attorney about a pending criminal case has less First Amendment protections because lawyers'

"extrajudicial statements *pose a threat to the fairness of a pending proceeding* since lawyers' statements are likely to be received as especially authoritative" because of the lawyers' "special access to information through discovery and client communications." Id. (Rehnquist, C.J., dissenting) (emphasis added). The First Amendment right of free speech in this context thus threatens the Sixth Amendment right that "[i]n all criminal prosecutions, the accused shall enjoy the right to…an impartial jury," U.S. Const. amend. VI, and "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right," Gentile, 501 U.S. at 1075 (Rehnquist, C.J., dissenting). Extrajudicial statements threaten the fairness of a pending criminal proceeding because

> the outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

Id. at 1070 (Rehnquist, C.J., dissenting). Again, this involves a justification "of a different [degree], not [kind]," for limiting First Amendment protections

about an entirely different type of speech in an entirely different context than what is involved in Crowley's case here.

The Bar further claims that "[r]estrictions are constitutional if they are *designed to protect the integrity and fairness of a state's judicial system and if they impose only narrow and necessary limitations on lawyers' speech*." (Bar Response at 12 (citing Gentile, 501 U.S. at 1075 (Rehnquist, C.J., dissenting) (emphasis added).) The emphasized portion is a minimally modified paraphrase from Gentile. The very next sentence in Gentile states exactly what the focus of those "limitations on lawyers' speech" is: "The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire." 501 U.S. at 1075 (Rehnquist, C.J., dissenting).

None of Crowley's comments pertained to or were likely to influence or prejudice the actual outcome or jury venire of a pending trial. Rather, Crowley's statements pertained to his political opponent in an election. The U.S. Supreme Court has explained the difference: "The very would 'trial' connotes decisions on the evidence and arguments properly advanced in open court. *Legal trials are not like elections*, to be won through the use of the meeting-hall, the radio, and the newspaper." Bridges v. California, 314

U.S. 252, 271 (1941) (emphasis added). Therefore, contrary to the Bar's claims, the narrow reasoning in the dissent of Gentile only applies to extrajudicial statements made by an attorney about a pending criminal trial—not to statements by an attorney about his political opponent in an election, as Crowley made here.

Thus, the U.S. Supreme Court's decision in Counterman cannot be reconciled with the Report's analysis and interpretation that a lesser First Amendment protection using an objective standard applies to Bar Rule 4-8.2(a), especially in the election context, even though Ray and Patterson did not involve that context. And if the Report does correctly interpret the holdings of the Florida Supreme Court in Ray and Patterson, then Counterman overturns those rulings by making clear that the First Amendment demands the subjective standard of recklessness be proven by the State before penalizing defamatory speech—even about those in the legal profession. See Counterman, 600 U.S. at 69, 79 n.5, 82.

Further, like the North Carolina law in Grimmett, Bar Rule 4-8.2(a) is both unconstitutionally overbroad and underinclusive, it "display[s] the State's special hostility towards defamatory speech against political candidates," Grimmett, 59 F.4th at 696 (cleaned up), and violation claims

are subject to discriminatory enforcement and could be abused and weaponized to shield and favor some public officials and candidates from criticism (for example, no candidate opposing Amira Fox would dare raise similar concerns or criticisms as Crowley did, if he is found in violation of Rule 4-8.2(a) for doing so, which would create a significant chilling effect and would keep voters ignorant and unaware of important issues).[4]

[4] Generally, defamation in elections is regulated by Fla. Stat. § 104.271(2). Had a charge been issued against Crowley under that statute for making the statements in this case, a subjective standard of "actual malice" would apply. Sharkey v. Fla. Elections Comm'n, 90 So.3d 937 (Fla. 2nd DCA 2012). Moreover, the statute only imposes a civil penalty up to $5,000. But the Report applies Bar Rule 4-8.2(a) using an objective standard and penalties could far exceed that of Fla. Stat. § 104.271(2).

This discrepancy is not justified by the conclusory, unsubstantiated comment to the Rule that "false statements by a lawyer can unfairly undermine public confidence in the administration of justice." R. Regulating Fla. Bar 4-8.2(a), cmt. Even if false statements about sitting judges might affect public confidence, lawyers campaigning for State Attorney are not comparable. State attorney positions are often decided by party affiliation in primary elections. See, e.g., Andrew Pantazi, "Should Florida prosecutors and public defenders have political parties?," The Florida Times Union, January 18, 2017; https://www.jacksonville.com/story/news/2017/01/18/should-florida-prosecutors-and-public-defenders-have-political-parties/15739326007/ (accessed Nov. 8, 2023). The state attorney position is highly politicized, and regulating candidates' speech beyond what is already covered by Fla. Stat. § 104.271(2) does not increase public confidence in the administration of justice, but rather raises more suspicions as the Bar appears to avoid transparency by silencing speakers to keep voters ignorant and to shield the courts and public legal officers and candidates from criticism.

Because of the heightened First Amendment concerns and protections in the election context here, the Report's analysis and finding of guilt must be reconsidered and reversed in light of the subsequent U.S. Supreme Court's clarification in Counterman.

The Recklessness Standard

Bar Rule 4-8.2(a) states that a "lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a…public legal officer…or candidate for election…to…legal office." The wording of the knowing-or-recklessness-element under Bar Rule 4-8.2(a) for penalizing speech about a public legal officer or candidate for election to legal office follows the wording which the U.S. Supreme Court set forth as required to penalize defamatory statements about a public official or figure: "knowledge that it was false or with reckless disregard of whether it was false or not." Counterman, 600 U.S. at 76 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)). Despite this similar wording, the Report relied on Ray, 797 So.2d at 558-59, and took the words of Bar Rule 4-8.2(a) to have a significantly different meaning and standard, which is in violation of the First Amendment as explained by Counterman.

There is no indication or evidence that Crowley knew his statements to be false and intentionally lied. Therefore, the Report based the finding of guilt on the theory that Crowley made statements about his political opponent, Amira Fox, in the 2018 primary for 20th Judicial Circuit State Attorney with reckless disregard as to their truth or falsity. (Report at 22 ("he acted with reckless disregard of the falsity of the statements, *when considered under an objective standard*" (emphasis added); "statements were made with a reckless disregard for Ms. Fox's involvement;" "statements…were made with reckless disregard for their truth or falsity").)

In Counterman, the Court held that in order to penalize a person for stalking on account of making true threats, even though such speech is "outside the bounds of First Amendment protection," the First Amendment "still requires proof" of the speaker's subjective mental state as reckless. 600 U.S. at 69. Thus, "*the State must show* that the [speaker] consciously disregarded a substantial risk that his communications would be viewed as threatening violence." Id. (emphasis added). This subjective mental state requirement avoids a chilling effect and provides "breathing room" for valuable speech. Id. at 75, 82.

The Court noted that this recklessness standard is the same *mens rea* requirement for penalizing a speaker for defamation. Id. at 75-76, 80. And if proving recklessness is required to penalize threatening speech in the context of stalking, then at least that same level of speaker-protection must apply to alleged defamatory political campaign speech, as Crowley is accused of here. Indeed, the Court explained that "we see no reason to offer greater insulation to threats than to defamation" because "the protected speech near the borderline of true threats…is, if anything, further from the First Amendment's central concerns than the chilled speech in Sullivan-type cases (*i.e.*, truthful reputation-damaging statements about public officials and figures)." Id. at 80-81.

Regarding defamation, the Court explained that

> False and defamatory statements of fact…have no constitutional value. Yet a public figure cannot recover for the injury such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not."

Id. at 76 (other internal quotation marks and citation omitted) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)). This recklessness requirement is "applicable in both civil and criminal contexts" of defamation. Id. at 80.

The Court explained that a "person acts recklessly…when he consciously disregards a substantial and unjustifiable risk." Id. at 79 (cleaned up). Thus, "recklessness is morally culpable conduct, involving a deliberate decision." Id. (internal quotation marks omitted). As further clarified in the concurrence, what speech is punishable under this "precise and demanding form of recklessness" standard established by Sullivan are "'only those false statements made with *a high degree of awareness of their probable falsity*.'" Id. at 102-03 (Sotomayor, J., concurring) (emphasis added) (quoting Garrison, 379 U.S. at 75). "This makes sense" because merely "[a]llowing liability for awareness of a small chance that a [statement] may be false would undermine the very shield Sullivan erects." Id. at 102 (Sotomayor, J., concurring).

Therefore, this precise and demanding recklessness culpability standard is significantly different from negligence, which is "an objective standard, of the kind [the U.S. Supreme Court] rejected" because an objective standard "makes liability depend not on what the speaker thinks." Id. at 79 n.5. Thus, "reckless defendants have done more than make a bad mistake." Id. at 80. But a low objective or negligence standard, disregarding what Crowley thought as "irrelevant," is exactly what the Report applies to

Crowley's statements in this case (Report at 22), and that objective standard violates the First Amendment's protections of freedom of speech.

Crowley's Statements

In the 2018 primary for the 20th Judicial Circuit State Attorney, Crowley and then-Chief Assistant State Attorney Amira Fox were candidates after then-State Attorney Stephen Russell announced his retirement. (Report at 3-4.) When applying the proper subjective recklessness standard required by the First Amendment, especially in the election context, the Bar failed to meet its burden in proving that Crowley violated Bar Rules 4-8.2(a) and 3-4.3.

A. Fox's father's book and uncle's ties to the PLO

On August 27, 2018, Crowley "copied and pasted portions of [an American Thinker] article, [which discussed, among other things,] Ms. Fox, onto his Facebook page, in addition to linking the article…with no corrections or other disclaimers." (Report at 4, 6 (citing Pl. Ex. 5b).) Crowley did not write the article. (Report at 6.) The article, "More Muslim Candidates for Political Office," contains a paragraph referring to Fox, which Crowley copied and pasted onto Facebook:

> Amira Dajani, a GOP candidate running for Florida attorney general under the name 'Amy Fox,' was recently discovered to

> be part of a family with deep ties to the PLO [the Palestine Liberation Organization], a terrorist group pledged to destroy Israel and led from 1969 to 2004 by Yasser Arafat, the father of modem terrorism. Dajani's father wrote an anti-Israel, anti-Jewish book and dedicated it to his daughter. He advocates Israel's destruction and, contrary to reality, accuses the Jewish State of using Arabs as human shields. The uncle of Dajani, AKA Fox, has served in high-level PLO leadership positions. Thus far, the candidate has been mum about the activities of her father and uncle.

(Report at 6 (quoting Pl. Ex. 5b(i) at 2, ¶ 4); Pl. Ex. 5b.) The above paragraph appears to be the only part of the article which Crowley copied and pasted onto his Facebook account, and nothing in that paragraph or Crowley's Facebook post claims that Fox is a Muslim. (Pl. Ex. 5b.) Crowley "then started publishing campaign materials that unequivocally stated Ms. Fox had 'close family ties to the PLO terrorist organization.'" (Report at 8 (quoting Pl. Ex. 4b; see also Pl. Ex. 4a).) But again, nothing in those campaign materials stated or claimed that Fox is a Muslim or that she went by the name "Amy." (Pl. Exs. 4a, 4b.)

The Report vaguely and conclusively claims, without any explanation or citing any evidence, that Crowley copied and pasted "false statements" from the article onto his Facebook page (Report at 6)—but the Report fails to identify what specific statements from the article are false. If the statements are not false, then they are protected under the First

Amendment and Crowley cannot be penalized. And even if they are false, there is not the slightest evidence that Crowley had "a high degree of awareness of their probable falsity," Garrison, 379 U.S. at 74; Counterman, 600 U.S. at 102 (Sotomayor, J., concurring), which he "consciously disregard[ed]," id. at 79, by linking to share an article written by another person and pasting one paragraph of the article on Facebook.

The Report also significantly distorts this issue into something it is not—being about Fox's religion. The Report asserts that Crowley "[c]laiming his political opponent was Muslim was directly putting her religious beliefs at issue." But there is no evidence that Crowley ever claimed Fox was Muslim. While the article Crowley linked to referred elsewhere to "some…recent Muslim candidates" (Report at 6 (quoting Pl. Ex. 5b(i) at 2, ¶ 3), Crowley did not copy and paste that portion of the article or say anything about Fox being a Muslim in his Facebook post. (Pl. Ex. 5b.) Additionally, nothing in any of his campaign materials states that Fox is a Muslim or refers to her religious beliefs. (Pl. Exs. 4a, 4b.)

Rather, the focus of the article and the only point of Crowley's Facebook post was only that Fox's father "wrote an anti-Israel, anti-Jewish book and dedicated it to [Fox]" and that her uncle "served in high-level PLO

leadership positions," which Fox “has been mum about.” (Report at 6 (quoting Pl. Ex. 5b(i), at 2, ¶ 4); Pl. Ex. 5b.) The Report claims that by referencing a portion of the article, Crowley somehow indirectly “spread the allegation that Ms. Fox was a Muslim.” (Report at 7.)

However, there is no evidence that Crowley ever claimed in any of his statements that Fox was a Muslim. In fact, “during his testimony Respondent stated more than once that he did not know Ms. Fox’s religious background *and he did not care*.” (Report at 7 (emphasis added).) Crowley’s testimony clearly showed that Fox’s religious beliefs did not matter and was not an issue in the campaign—“he did not care” what religion Fox was because it did not matter. Consistent with his testimony, a reporter for Naples Daily News noted during the campaign on August 18, 2018 that Crowley said “‘I don’t know what religion Ms. Fox is and I don’t care,’…. [Crowley] said he’s never made race or ethnicity an issue in the campaign.” (Resp’t Ex. 3.) Yet the Report unconstitutionally faults Crowley for not “verifying the truth or falsity” of whether Fox was a Muslim (even though Crowley never claimed she was) and concludes that Crowley somehow thereby “endorsed a view that his opponent was unqualified for public office based on her race, ethnicity, and/or religion” (Report at 7),

which is a mischaracterization of the facts and evidence in this case. And even if Crowley can somehow be considered responsible for spreading a statement in an unquoted portion of a linked article, there is still no evidence identified in the Report that Crowley had a high degree of awareness of any probable falsity, which he consciously disregarded. In fact, the opposite is shown by the evidence, which proves that Crowley did not know Fox's religion, and therefore would not have known if the statement was probably false.

Crowley did not have a duty of "verifying the truth or falsity" of whether Fox was a Muslim as the Report claims. Under the First Amendment, Crowley cannot be held to an objective or negligence standard or have the burden of proving this. And as the Maryland Court of Appeals explained,

> during the heat of a political campaign…there may be limited time to vet language, and a short and snappy one-liner usually prevails over a lengthier, more carefully phrased sentence. Opposing candidates for judicial office do not have the opportunity to depose each other. And campaign flyers are not appellate briefs. In this context, imprecise wording is not necessarily a violation of [Rule 4-]8.2(a).

Stanalonis, 126 A.3d at 13. And, as the U.S. Supreme Court held, "erroneous statement is inevitable in free debate, and it must be protected

if the freedoms of expression are to have the breathing space that they need to survive." Garrison, 379 U.S. at 74-75.

Whether Fox was a Muslim was not the point of Crowley's statements anyway. The point was Fox's father allegedly wrote an "anti-Israel, anti-Jewish book" which was dedicated to her, and that her uncle "served in high-level PLO leadership positions." According to one of the campaign materials, the book dedication states:

> Without the *support* of my…daughters, Amira and Zena, it would have been difficult to…finish writing my memoir…I thank them for *their support, suggestions and valuable editorial comments*.

(Pl. Exs. 4a, 4b (emphasis added; ellipses in original).) This does not merely dedicate the book to Fox, but indicates that Fox supported the book and even provided suggestions and valuable editorial comments. For this reason, Crowley raised as a concern that Fox would not denounce or disavow the PLO and her father's book which was dedicated to her. (Report at 8; Pl. Exs. 4a, 4b.)

This possible support of the PLO and involvement with helping her father express the views in the book could be a valid concern to some voters. According to the Anti-Defamation League (ADL), the initial "guiding ideology of the PLO was outlined in the Palestine National Charter or

Covenant, which…contained 33 articles calling for the destruction of the State of Israel," and the "PLO was responsible for scores of acts of terrorism" against Israelis. (Resp't Ex. 19.)[5] Another article about Fox and her father's book by Michael Braun with Fort Myers News-Press dated June 20, 2018, "Memoir by father of state attorney candidate raised as campaign issue," notes the following from a "member of the Southwest Florida Chapter of the Zionists of America,…Jerry Sobel": "'The bottom line is, does [Fox] support the book?' [Sobel] asked, adding that *unless [Fox] personally renounces the book he could not cast a vote for her*." (Resp't Ex. 9 (emphasis added).) And a different article by Brent Batton with Naples Daily News acknowledged that "some of [Fox's father's] views and conclusions would no doubt cause supporters of Israel to take issue and even offense. He describes how his brother, Sidqi, was on the PLO executive committee…." (Resp't Ex. 3.)

Voters, like Sobel, could be concerned that Fox, as the district's head prosecutor, might be biased and not treat Jewish victims or Jewish defendants fairly and equally, especially a Jewish victim who was attacked

[5] ADL, "Palestine Liberation Organization," published Sept. 1, 2016; https://www.adl.org/resources/backgrounder/palestine-liberation-organization-plo (accessed Nov. 1, 2023).

or threatened in a hate-crime by a supporter of Palestine,[6] if Fox shares her father's or uncle's views and supports the PLO. Such a concern of bias and calls on public officials to publicly denounce and disavow such groups is not uncommon. For example, shortly after the terrorist attack by Hamas on Israel during October 2023, U.S. Representative Rashida Tlaib, "who has criticized Israel for the attack" by Hamas, was repeatedly asked questions by a FOX Business reporter such as, "Do you condone what Hamas has done chopping off babies' heads, burning children alive, raping women in the streets?" and "why do you have the Palestinian flag outside your office if you do not condone what Hamas terrorists have done to Israel? Do Israeli lives not matter to you?"; however, Tlaib "refused to respond to the reporter."[7] Additionally, U.S. Representative Jack Bergman raised some of

[6] See, e.g., Dakin Andone et al., "Jewish man dies from head injury following 'interaction' with pro-Palestinian demonstrator in California, authorities say," CNN, Nov. 7, 2023; https://www.cnn.com/2023/11/07/us/thousand-oaks-protest-man-dies/index.html (accessed Nov. 8, 2023) ("A 69-year-old Jewish man died after suffering a head injury Sunday following an "interaction" with a pro-Palestinian demonstrator during dueling rallies in Southern California, the Ventura County Sheriff said Tuesday, adding authorities had not ruled out the possibility of a hate crime.").

[7] Kristine Parks, "Rashida Tlaib dodges reporter repeatedly asking if she condemns Hamas slaughtering infants," Fox News, Oct. 11, 2023; https://www.foxnews.com/media/rashida-tlaib-dodges-reporter-repeatedly-asking-condemns-hamas-slaughtering-infants (accessed Oct. 18, 2023).

the same concerns and filed a censure resolution against Tlaib, saying she has a "long history of making anti-semitic and anti-Israeli remarks;"[8] and U.S. Senator Markwayne Mullin "called for strong GOP House leadership to push back on what he said was Tlaib's 'bias.'"[9] Likewise, if a political candidate appeared to support or have family ties to a white-supremacist group, it would be fair and reasonable to raise concerns of bias and ask the candidate to denounce and disavow such groups, without the questions or remarks being considered defamatory or discriminatory—and that is famously what the moderator of the September 2020 presidential debate asked then-President Trump to do, drawing an ambiguous response.[10]

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[8] Sara Powers, "Rep. Rashida Tlaib facing censure over response to Hamas attack on Israel," CBS Detroit, Oct. 18, 2023; https://www.cbsnews.com/detroit/news/rep-rashida-tlaib-facing-censure-over-response-to-hamas-attack-on-israel/ (accessed Oct. 18, 2023); see also Clare Foran et al., "House passes resolution to censure Tlaib over Israel comments," CNN, Nov. 8, 2023; https://www.cnn.com/2023/11/07/politics/rashida-tlaib-censure-vote/index.html (accessed Nov. 8, 2023).

[9] Oren Oppenheim, "Tlaib refuses to apologize for blaming Israel for Gaza hospital blast, attacks Biden," ABC News, Oct. 18, 2023; https://abcnews.go.com/Politics/tlaib-refuses-apologize-blaming-israel-gaza-hospital-blast/story?id=104085727 (accessed Oct. 19, 2023).

[10] Sarah McCammon, "From Debate Stage, Trump Declines to Denounce White Supremacy," NPR, Sept. 30, 2020; https://www.npr.org/2020/09/30/918483794/from-debate-stage-trump-declines-to-denounce-white-supremacy (accessed Nov. 2, 2023).

One of the reasons the First Amendment gives broad protection to such calls for response and criticism of public officials and candidates is that they have an opportunity and platform to respond. "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then [sic] private individuals normally enjoy." Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974); see also Counterman, 600 U.S. at 112 (Barrett, J., dissenting) (noting that for this reason "'the state interest in protecting' public figures is weaker" because there is a "low potential for injury (because public figures can engage in counterspeech)").

Indeed, such was the situation in this case as Fox did publicly address any concerns about her father's book, as published in Michael Braun's Fort Myers News-Press article, saying that the book "is written from [her father's] perspective on his life, not mine," and called on voters to focus on "the issues that matter most." (Resp't Ex. 9.) This counterspeech from Fox maintained a low potential for injury as shown by the fact that Fox still won the primary and was elected. (See Tr. at 151.)

The Report also faults Crowley for posting the following quote from the American Thinker article on Facebook: "Amira Dajani, a GOP candidate running for Florida attorney general under the name 'Amy Fox'…." (Report at 7 (citing Pl. Ex. 5b (Facebook post quoting article)).) But Crowley himself never said that, and that was far from the focus or point of the paragraph in the article, which was about her father's book and uncle's ties to the PLO. In none of Crowley's campaign materials or any other evidence cited by the Report did Crowley ever say that Fox went by the name "Amy." (Pl. Exs. 4a, 4b.) In fact, in another Facebook post from that very same day, August 27, 2018, Crowley links to another post referring to Fox as "Amira" and makes no claim that she goes by the name "Amy." (Pl. Ex. 5c.)

The point of that quoted comment in the article seems to be highlighting the difference between Fox's current *last* name and her family name, Dajani—not her first name—to show her connection with the book's author, Taher Dajani, as Fox's father (Pl. Exs. 4a, 4b, 5b.) Regardless, including this small phrase in part of a larger quoted paragraph of an article, especially where this is the only instance and context in the entire campaign where the name "Amy" is indirectly mentioned by Crowley, is not a statement "concerning the qualifications or integrity of a…public legal

officer…or candidate for election…to…legal office," R. Regulating Fla. Bar 4-8.2(a), and therefore cannot constitute a violation even if the statement had been recklessly made, which it was not.

The Report then criticizes Crowley because he "laughed throughout" a radio host's narration when the host opened by stating "this race has been nasty…. from her, just basically short of strapping up for ISIS, to you being a felon, I mean the stuff going on has been nothing short of ridiculous but hey, look, its politics." (Report at 9 (quoting Pl. Ex. 16 at 0:10-0:35) (emphasis added) (ellipsis in original).) But the Report mischaracterizes this and inexplicably leaves out details that Crowley does not actually laugh "throughout" the narration, and only laughs at two very distinct moments in response to specific comments: (1) right after the host says "this race has been nasty," and (2) right after the host says "to you being a felon" (referencing Crowley's arrest for receiving a campaign contribution from a raffle, which is discussed below)—but what Crowley does *not* laugh at or after is the comment "from her, just basically short of strapping up for ISIS." (Pl. Ex. 16 at 0:10-0:35.) Crowley is a guest on the radio show while campaigning for office—he has no duty or obligation to chastise the host for his ISIS comment, which was clearly hyperbole.

The Report ends discussion of this topic by stating that "[i]t is apparent that at least some of the public realized [Crowley's] statements were offensive and unrelated to the issues of the election," and specifically claims that "one of the reporters for the Charlotte Sun newspaper called out Respondent for this inappropriate accusation" about Fox's father's book being dedicated to her, which the reporter said "'was offensive.'" (Report at 8-9 (quoting Resp't Ex. 25 (which is actually an article "calling out *Fox and Russell*" (emphasis added) for having Crowley investigated for receiving a campaign contribution from a raffle—a decision the article calls "Chickenpoop.")).) But clearly other members of the public, like Jerry Sobel of the Southwest Florida Chapter of the Zionists of America, thought this matter was related to the issues of the election. And "some of the public['s]" opinion that Crowley's statements were "offensive and unrelated to the issues of the election" has no bearing on whether the statements are true, made recklessly, or protected by the First Amendment.

As the U.S. Supreme Court has explained,

> The First and Fourteenth Amendments embody our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Garrison, 379 U.S. at 74-75; see also Snyder v. Phelps, 562 U.S. 443, 460-61 (2011) (holding that although "Westboro's funeral picketing is certainly hurtful and its contributions to public discourse may be negligible," the First Amendment still shielded Westboro from tort liability for intentional infliction of emotional distress and intrusion upon seclusion).

Crowley had no duty to post "corrections or other disclaimers" (contra Report at 6) about the American Thinker article he linked to on Facebook, nor was he prohibited from linking to the article "without verifying the truth or falsity" (contra Report at 7) of a claim made elsewhere in the article separate from the portion he quoted. Crowley never "directly put[]...religious beliefs at issue" or "call[ed] into question the qualifications of candidates being Muslim" (contra Report at 8), as none of his statements had anything to do with Fox's religion, and Crowley made no claim that Fox was Muslim. Crowley's only concern was Fox's possible support of the PLO, which ultimately has nothing to do with race, ethnicity, national origin, or religion since people can support the PLO or other similar organizations without being from Palestine or being Muslim, and she had a platform to respond to that claim with counterspeech.

Again, if the statements are not false, then they are protected under the First Amendment and Crowley cannot be penalized. And even if any statements "concerning the qualifications or integrity" of Fox were false, there is still not the slightest evidence that Crowley had a high degree of awareness of any probable falsity, which he consciously disregarded at the time. The Bar did not meet its burden as required by the First Amendment. Rather, it is clear from the evidence that Crowley did not make these statements with a subjectively reckless disregard for the truth. Therefore, Crowley cannot be found in violation of Rule 4-8.2(a) in light of the clarity brought by Counterman.

B. Fox having Crowley arrested

The Report next faults Crowley for making statements which claimed Fox was involved with him being arrested for a raffle at one of his campaign events. (Report at 9.) The Report finds that these statements were false and not supported by evidence because Fox's boss, then-State Attorney Russell, is the one who reported the matter to the Florida Department of Law Enforcement (FDLE) in a June 25, 2018 letter, had the matter assigned to another State Attorney's Office, told the Bar in an August 27, 2018 letter that Fox had no involvement in the matter (which was after

Crowley's statements alleging this, as outlined in the Report, had been made, and there is no indication in the Report that Crowley received a copy of this letter at the time), and testified to the same (as did Fox) at the February 2021 hearing. (Report at 9-13.)

But, again, the statements being false and Crowley allegedly not having an objectively reasonable factual basis for making them does not meet the standard required under the First Amendment for penalizing Crowley on account of his speech. Even if the statements were false, the Bar failed to meet the subjective recklessness standard and show that Crowley had a high degree of awareness of any probable falsity, which he consciously disregarded when making the statements. Rather, the evidence noted in the Report shows the opposite.

Crowley clearly cannot be assumed or required to have known in hindsight what was later introduced in evidence and testified to at the February 2021 hearing. "Opposing candidates for judicial office do not have the opportunity to depose each other," Stanalonis, 126 A.3d at 13, and Crowley is not privy to every inner working of the State Attorney's Office. There was no evidence presented by the Bar that Crowley had a high degree of awareness that Fox probably had no involvement in the raffle

matter being reported to FDLE, which led to his arrest, and thus "had [him] arrested" on account of her actions. Even if Crowley was mistaken and his comments were not accurate, he cannot be held to an objective standard which "makes liability depend not on what the speaker thinks," because "reckless defendants have done more than make a bad mistake." Counterman, 600 U.S. at 79-80 & n.5.

To the contrary, the Report notes Crowley told a radio host on August 20, 2018, "I challenged [Fox] to denounce [her father's book] in June and what did she do, she had me arrested." (Report at 12 (quoting Pl. Ex. 16).) The Report also states that Crowley "alleged that Ms. Fox had him arrested *in retaliation*" for bringing up the issue of her father's book. (Report at 9.) The Report notes that Crowley testified that

> he had "circumstantial evidence" that Ms. Fox was involved. The circumstantial evidence he relies upon is the fact that Ms. Fox and Stephen Russell work closely together and that Mr. Russell supported Ms. Fox's campaign for the State Attorney position. Respondent argues that Mr. Russell's receiving and referring Respondent's criminal case to the FDLE means Ms. Fox also had to be involved. During his testimony, Respondent stated, "I have a good faith basis for believing Amira Fox had me thrown in jail," and "I believe that Amira Fox was directly involved," and "I thought she had something to do with it."

(Report at 13.) Consistent with these beliefs about Fox's involvement, Crowley had told the radio host on August 20, 2018 that "Russell, who was

campaigning for Amira Fox, sent a complaint to [FDLE]" and that Fox and Russell "are a pair, they work together on everything." (Pl. Ex. 16 at 12:26-31, 13:02-06.) This is a reasonable belief Crowley held at the time, and it contradicts any finding that he had a high degree of awareness of any probable falsity in the statements he made.

Crowley's understanding about Fox's involvement in every aspect of the State Attorney's Office's operations are even supported and confirmed by Fox's biography on the State Attorney's Office website under "About Us" and "Meet Amira Fox": "in 2015 [Fox] became Chief Assistant State Attorney *overseeing the day to day legal and administrative functions of the office*, including the operation of grand juries throughout the circuit."[11] As the Chief Assistant State Attorney, Fox was closely involved with and responsible for all functions of the Office.

The Bar has not shown that Crowley did anything "more than make a bad mistake," Counterman, 600 U.S. at 80, and thus failed to prove that Crowley had a high degree of awareness of any probable falsity in his statements, which he consciously disregarded when making them.

[11] https://sao20.org/amira-d-fox/ (accessed Nov. 3, 2023) (emphasis added).

Therefore, Crowley cannot be held in violation of Bar Rule 4-8.2(a) for these statements either.

C. Fox having a 39% conviction rate

Likewise, the Bar failed to prove that Crowley had a subjectively reckless mental state in making claims that Fox had a 39% conviction rate for 2016, and the evidence established otherwise. (Report at 13-15.) The Report explains that Crowley asked William Smith, a former IT coordinator for the 20th Circuit State Attorney's Office from 2003 through 2012, "to calculate Lee County's conviction rate for 2016." (Report at 14). Smith replied to Crowley in February 2018 with the following:

> Lee County 2016 arrest during 2016 = 27494
> Lee County 2016 arrest with adjudication of guilty= 10586
> 2016 Conviction Rate: 38.5%

(Report at 14 (quoting Resp't Ex. 22).)

Crowley did not make up the 39% number, nor did he come up with it himself. Instead, he contacted an IT expert who had extensive experience and knowledge of the State Attorney's Office from having worked there for nine years. After gathering data, the IT expert told Crowley that the conviction rate was close to 39%. (Resp't Ex. 22.)

However, the Report still faults Crowley because, three years later in February 2021 during the hearing and cross-examination of Smith, "*it was discovered that the calculations by Mr. Smith left out information*. The numbers do not include or consider withholds of adjudication and cases wherein a defendant was arrested in 2016 and adjudicated guilty in 2017 or 2018." (Report at 14 (emphasis added).) But again ""there inevitably is some imprecision in language used during the heat of a political campaign," which "is not necessarily a violation of [Rule 8-4.2(a)]" as the rule "does not require absolute precision in the expression of political speech as part of an election campaign." Stanalonis, 126 A.3d at 13, 15.

And even if the calculation is not precise, there is no evidence that Crowley is a statistician or understood its imprecision at the time he made the statements, as he was relying on the accuracy of the calculation made by Smith. Again, the Bar did not show that Crowley did anything "more than make a bad mistake," Counterman, 600 U.S. at 80, and thus failed to prove that Crowley had a high degree of awareness of any probable falsity in his statements, which he consciously disregarded when making them. Further, Fox had a platform for counterspeech to respond to any false calculations with her own statistics.

The Report then further faults Crowley for attributing this 39% conviction rate to Fox personally, rather than to the Office as a whole. But this reasoning ignores that Fox, as the Chief Assistant State Attorney, was closely responsible for overseeing all functions of the Office. Again, Fox's biography on the State Attorney's Office website states that "in 2015 [Fox] became Chief Assistant State Attorney *overseeing the day to day legal and administrative functions of the office*, including the operation of grand juries throughout the circuit."[12] Therefore, as the Report notes, "[Crowley] often used the terms 'State Attorney's Office' and 'Amira Fox' interchangeably." (Report at 17.)

It is thus reasonable, or at least not reckless, for Crowley to consider Fox as personally responsible for this conviction rate, just as a football coach is blamed for his team's poor winning record even though the coach was not on the field playing in the games himself. Therefore, when testifying in this case, Crowley continued to maintain that the Office's conviction rate was still attributable to Fox specifically. (Report at 15.)

Since Crowley did not have a high degree of awareness of any probable falsity in the statements, which he consciously disregarded when

[12] https://sao20.org/amira-d-fox/ (accessed Nov. 3, 2023) (emphasis added).

making them, he cannot be in violation of Bar Rule 4-8.2(a) for these statements under Counterman.

D. Fox and Russell being "corrupt" and "swampy"

The Report then faults Crowley for calling Fox and Russell "corrupt" for actions leading to his arrest, and calling Fox "corrupt" and "swampy" (which Crowley "testified were synonymous terms") "because of her failures to do her job"—"the fact that 'they weren't enforcing the law.'" (Report at 15-16.) "When testifying about the 39% conviction rate, [Crowley] stated 'I think that is corrupt,'" and Crowley pointed to some specific cases claiming Fox was "corrupt because she failed to prosecute Desmaret, the Lake Boys, the slaughter houses, and improperly convincing a grand jury not to indict prison guards in the Matthew Walker case." (Report at 22.)

The terms "corrupt" and "swampy" are clearly understood as Crowley's opinions used in name-calling his political opponents, and should not be actionable as false statements of fact in the first place. When former-President Trump uses terms like "Crooked Hillary" and "Crooked Joe Biden,"[13] those statements are not considered defamatory of public

[13] "Trump retires 'Crooked Hillary,' introduces 'Crooked Joe Biden,'" Politico, April 27, 2023; https://www.politico.com/video/2023/04/27/trump-retires-crooked-hillary-introduces-crooked-joe-biden-899960 (accessed Nov. 6, 2023).

figures. And the Report itself notes that "corruption" can mean "an impairment of integrity, virtue, or moral principle." (Report at 16 (quoting Black's Law Dictionary (11th ed. 2019)).) Accusing someone of an "impairment of virtue or moral principle" is far too ambiguous to constitute a false statement of fact, and is clearly understood as a matter of opinion.

Additionally, the Report notes that Crowley "argues he had circumstantial evidence that Ms. Fox used her office to have him arrested for the benefit of her own campaign; thus, she is corrupt." (Report at 16.) As discussed above, even if mistaken, Crowley's beliefs in this circumstantial evidence does not meet the subjective recklessness standard.

The Report faults Crowley for assigning responsibility to Fox of the four specific cases mentioned because Crowley "attributed his perceived failures to convict Desmaret to Ms. Fox, personally," even though Crowley knew Fox was "only in a 'management' role in the office." (Report at 17-18.) Crowley likewise "admitted Ms. Fox was not directly involved in the Lake Boys trials." (Report at 18.) Regarding the Matthew Walker case, "[Crowley's] knowledge was that Ms. Fox was 'in the room' during the grand jury proceedings. Nonetheless, [Crowley] alleged Ms. Fox was

corrupt for improperly interfering with a grand jury." (Report at 18.) But Crowley's belief of Fox's involvement was later confirmed by a report of a grand juror stating, "[w]e knew they were guilty…but we were talked out of indicting them," and Fox's own statement to a reporter: "I spent a very long time going over that evidence and presenting it to the grand jury." (Resp't Ex. 26 at 2-3.)

And "concerning the slaughter house investigations, [Crowley] stated during his testimony that Ms. Fox 'was a part of the process of the decision not to prosecute.' And, in his opinion, failing to prosecute those involved in the slaughter houses was corrupt." (Report at 18.) Further, Crowley's witness, Richard Cuoto, who had investigated and reported on the slaughter houses, had copied Fox on emails to the prosecutor assigned to the review and investigation of the slaughter houses, showing that Fox was aware and kept informed of the case. (Report at 18-19.)

Crowley's criticism of Fox is not significantly different from the criticism for neglect of duty and incompetence of former State Attorney Monique Worrell by Florida Governor Ron DeSantis and Attorney General Ashley Moody—yet the Bar does not appear to be filing a Rule 4-8.2(a) or 3-4.3 violation against them for their statements (as it should not). In a

press release, DeSantis stated, “The people of Central Florida deserve to have a State Attorney who will seek justice in accordance with the law instead of allowing violent criminals to roam the streets and find new victims;” and Moody stated, “We are fortunate to have a Governor committed to the rule of law and holding officials—especially those elected to protect the public—accountable for not doing the jobs they swore an oath to do. Ms. Worrell abdicated her responsibility as the circuit’s top prosecutor and her actions undermine the safety and security of our state and Floridians.”[14] DeSantis’s Executive Order for Worrell’s removal further notes that, despite Worrell not being personally involved in every prosecution,

> during Worrell's tenure in office, the administration of criminal justice in the Ninth Circuit has been so clearly and fundamentally derelict as to constitute both neglect of duty and incompetence; and…Worrell has authorized or allowed practices or policies that have systematically permitted violent offenders, drug traffickers, serious juvenile offenders, and pedophiles to evade incarceration when otherwise warranted under Florida law. These practices or policies include non-filing or dropping meritorious charges or declining to allege otherwise provable facts to avoid triggering applicable lengthy sentences,

[14] “Governor Ron DeSantis Suspends State Attorney Monique Worrell for Neglect of Duty and Incompetence,” August 9, 2023; https://www.flgov.com/2023/08/09/governor-ron-desantis-suspends-state-attorney-monique-worrell-for-neglect-of-duty-and-incompetence/ (accessed Nov. 1, 2023).

> minimum mandatory sentences, or other sentencing enhancements….

Executive Order 23-160 at 2-3.[15]

Again, Crowley's beliefs about Fox's role and responsibility in his arrest, the Office's conviction rate, and the failure to adequately prosecute these four cases is based on Fox's position as the Chief Assistant State Attorney. While Fox was not the head State Attorney, she still had the responsibilities and authority of "*overseeing the day to day legal and administrative functions of the office*, including the operation of grand juries throughout the circuit."[16] And so, "[Crowley] often used the terms 'State Attorney's Office' and 'Amira Fox' interchangeably." (Report at 17.) Therefore, even if any of these statements could be considered false, Crowley nevertheless did not have a high degree of awareness of any probable falsity in the statements which he consciously disregarded when

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[15] The suspensions of this and another state attorney (Executive Order 22-176) by Governor DeSantis demonstrate the executive power placed in the governor over state attorneys. Thus, specifically regulating speech about state attorneys and candidates raises concerns about separation of powers as it could encroach on that executive power. "Under the separation of powers doctrine, no branch may encroach upon the powers of another." Office of State Attorney v. Polites, 904 So.2d 527, 532 (Fla. 3d DCA 2005).

[16] https://sao20.org/amira-d-fox/ (accessed Nov. 3, 2023) (emphasis added).

making them. As such, Crowley cannot be in violation of Bar Rule 4-8.2(a) for these statements under Counterman.

Conclusion

The U.S. Supreme Court's recent decision in Counterman has made clear that the previous Referee's analysis applying an objective standard to find Crowley in violation of Bar Rules 4-8.2(a) and 3-4.3 for statements about his political opponents during a campaign is unconstitutional under the First Amendment. Contrary to the Report's holding, Crowley's view, opinion and personal thoughts *are relevant* when considering Rule 4-8.2(a), and the fact that Crowley *genuinely believed in his statements* about Ms. Fox *does preclude* the finding that he acted with reckless disregard of any falsity of the statements. (Contra Report at 22.)

The Bar failed to meet its burden in showing that even if any of Crowley's statements were false concerning the qualifications or integrity of a public legal officer or candidate for election to legal office, Crowley did not have a high degree of awareness of any probable falsity, which he consciously disregarded when making them, and therefore did not have the subjective *mens rea* of recklessness, which is required by the First Amendment to penalize him for such speech. Crowley cannot be

responsible or faulted for not knowing in hindsight what was not revealed until later in testimony and evidence as part of these proceedings, and he had no obligation to verify the truth of his statements or make disclaimers about others' statements. See Sharkey v. Fla. Elections Comm'n, 90 So.3d 937, 939-40 (Fla. 2nd DCA 2012) (agreeing for subjective standard in defamation that "there is no duty to investigate" and "proof of defendants' failure to investigate,…without more, cannot establish reckless disregard for the truth").

Again, "erroneous statement is inevitable in free debate, *and it must be protected* if the freedoms of expression are to have the breathing space that they need to survive." Garrison, 379 U.S. at 74-75 (emphasis added). Thus, to penalize any public-figure defamation, at a minimum the speaker must have had "a high degree of awareness of [an erroneous statement's] probable falsity,'" id. at 75; Counterman, 600 U.S. at 102-03 (Sotomayor, J., concurring), because merely "[a]llowing liability for awareness of a small chance that a [statement] may be false would undermine the very shield Sullivan erects," id. at 102 (Sotomayor, J., concurring). And Fox, as a public official and candidate, had a platform to counter all of Crowley's

statements and any inaccuracies, which she successfully did and won the election.

As the Florida Supreme Court's holdings in Ray and Patterson did not address campaign speech in the election context, this case is distinguishable. But if those holdings apply to this case, then Counterman overturns Ray and Patterson, and the Fourth Circuit's decision in Grimmett shows that Bar Rule 4-8.2(a) is facially unconstitutional.

WHEREFORE, Crowley respectfully requests that the previous Referee's Report and findings be vacated and reconsidered in light of Counterman; and that the November 6, 2023 Order Denying Respondent's Motion for Summary Judgment also be vacated and that the Respondent's Motion for Summary Judgment likewise be reconsidered in light of Counterman,[17] and that Crowley be given an opportunity to reply to the

[17] As the Bar acknowledged in its Response, "[t]he requests for relief that would be proper after trial and a determination of guilt are a request for reconsideration," and "[t]he only way to reconsider and adjudicate the matters again would be to vacate the Referee's prior rulings on guilt and then consider a motion for summary judgment." (Bar Response at 3, 5.) Since there is now a "basis upon which the findings of guilt should be vacated" (see Bar Response at 3) in light of Counterman, as set forth in this Motion, the Report should be reconsidered and vacated.

Bar's erroneous contention that Fla. Stat. § 768.295 does not apply to The Florida Bar disciplinary proceedings.

Respectfully submitted,

/s/
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Participating Attorney for
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Co-Counsel for Respondent

Certificate of Service

I certify that this Motion to Reconsider has been furnished this 8th day of November 2023 by e-mail to:

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/s/
Phares Heindl
Co-Counsel for Respondent