IN THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT,
STATE OF FLORIDA

SKYLAR FRANCIS,

Appellant,

v. CASE NO. 5D18-3587

STATE OF FLORIDA,

Appellee.

_________________________/

ON APPEAL FROM THE CIRCUIT COURT,
EIGHTEENTH JUDICIAL CIRCUIT,
BREVARD COUNTY, FLORIDA

APPELLANT'S AMENDED INITIAL BRIEF

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STATEMENT OF THE CASE

Appellant Skyler[1] Francis was charged by the State with one count of attempted second-degree murder on a law enforcement officer, and one count of aggravated battery on a different law enforcement officer. (R 33-34) Specifically, the State charged on Count I that the defendant "did attempt to...unlawfully kill a human being, Michael Hriciso, a law enforcement officer, said attempted killing being perpetrated by an act imminently dangerous to another and evincing a depraved mind regardless of human life...and toward the commission of said offense...did actually and intentionally strike Michael Hriciso several times with a baton/asp." (R 33) Count II alleged that the defendant "did knowingly commit an aggravated battery upon a law enforcement officer, Marie Skinner, while said law enforcement officer was engaged in the lawful performance of said officer's duties...and in the commission of said battery...used a deadly weapon, to wit: baton/asp." (R 33-34) Both offenses were alleged to have taken place on January 26, 2016. (R 33)

The defendant was 22 years old and lived in his family's home at the time of the incident that gave rise to the charges. (T 985, R 19) Retained counsel appeared for the defendant in February, 2016 and remained in the case until January, 2018.

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[1] Mr. Francis's name was misspelled as "Skylar" on the notice of appeal.

(R 35, 167) The record indicates that the family became dissatisfied with the firm's representation, and that a dispute over billing took place; the record also indicates the defendant had become difficult for counsel to communicate with. (R 165-66, 180)

On defense counsel's motion Dr. Eric Mings was appointed to determine the defendant's competency to assist counsel. (R 163-64, 167) His February, 2018 report appears in the record. (R 179-82) The doctor noted in his report that the family cooperated with the evaluation, but that he was provided with no school, medical, or psychiatric records. (R 180) He further noted that the defendant's speech patterns are "concrete and unusual," that his social presentation is "somewhat robotic...consistent with the possibility of a mild impairment on the autism spectrum," and that he was cooperative "within the limitations of his condition." (R 180-81) The doctor concluded that the defendant was competent to assist counsel. (R 181-82)

The Office of the Public Defender argued a motion to dismiss the charges in July, 2018. (SR 541-867; R 152-61) The motion asserted that on the day of the incident that gave rise to the charges, the police acted outrageously by pulling down the fence around the defendant's property and entering in aggressive physical pursuit of him, although they had no warrant and although any exigency

in the situation had dissipated before the officers acted. (R 152-59) The motion alleged that the defendant's right to due process was violated by the officers' actions and that dismissal was therefore warranted. (R 159-60) At a hearing on the motion, the defense argued in the alternative that the officers were not engaged in the lawful performance of their legal duties from the time of the unlawful entry, and that the charges ought to be dismissed to the extent they were enhanced by the allegation that the victims were law enforcement officers. (SR 844, 856-60) The State argued that when seeking dismissal on grounds of outrageous government activity, the defense must show that the State "essentially" caused the charged conduct to occur, citing entrapment cases and a case where the State had manufactured crack cocaine. (SR 860-61, 865) The court denied the motion to dismiss (R 194-99), ruling that the caselaw relied on is applicable only where "government conduct results in the potential creation of crime." (R 196) The court further found that no egregious government conduct took place. (R 197-99)

On September 26, 2018, at a calendar call, the defendant sought in vain to consult with his assistant public defender. (SR 872, 882-83) That same day new private counsel filed a notice of appearance. (R 202)

During the September 26 calendar call, out of the defendant's hearing, the assistant public defender ("APD"), the assistant state attorney ("ASA"), and the

court discussed the defendant's demeanor. (SR 873-81) The ASA noted that the defendant had called his office to complain about both offices' conduct, and the APD reported the defendant had "been harassing the people in my office." (SR 874-75) The court responded "I'm quite sure he's difficult...he's kind of off the chain." (SR 875) The APD elaborated that in his view "odd bird" was "a very, very nice way" of describing the defendant, and noted that he "was manageable up until really recently." (SR 877) The court and ASA agreed that "client control" was going to be a difficulty going forward. (SR 879) The court concluded that "the sooner that we get him resolved, the better," denied a last continuance, and set the case for trial in the third week of the trial period beginning October 15. (SR 879, 882)

On September 27, 2018, newly hired counsel filed an Emergency Motion for Continuance of Trial, in which he noted he had been retained the day before for what he anticipated would be a five-day trial. (R 203) A hearing was held on the motion before the trial court on October 4. (SR 885-901) At the hearing the court noted that the case was 981 days old, and noted that it had ruled, on September 26, that the final continuance had already been granted. (SR 890) Defense counsel responded "I'd like to be prepared," and asked for the case to be continued to the next trial docket. (SR 890) The ASA objected, taking the position

that "[e]very time Mr. Francis gets in a posture of going to trial, he ends up with a new attorney." (SR 891-92) The court denied the motion, ruling "I have an obligation to be a good steward of the docket...the cardinal rule is, you take a case that's set for a date-certain trial, you know what you're in for." (SR 893) The case remained on the docket for October 29. (SR 893)

The parties convened for a hearing on a motion for change of venue on October 19. (SR 903-26) At that hearing defense counsel again referred to the short time he had been in the case. The judge, the Honorable Robin C. Lemonidis, Circuit Judge, responded "justice delayed is justice denied, all the way around. And I told you, you take an old case, you try it quickly. You buckle down...this is not a super-complicated [case from an] evidentiary or scientific [standpoint.]" (SR 915-16) Defense counsel responded that he thought the case was a winnable one. (SR 916)

The parties reconvened before Judge Lemonidis on October 29 for jury selection. (T 1-439) During his questioning of the venire, defense counsel announced that an element of both charged offenses (attempted second-degree murder and aggravated battery) was intent to kill. (T 330, 333) The court admonished counsel at the bench not to misstate the law. (T 333-42) Defense counsel later asked the venire "[d]o you think that the police have the right to

break into your home without a warrant if you were arguing with somebody in your home?" (T 366) The court warned counsel, at the bench, that he was inappropriately seeking to test the evidence in voir dire. (T 366)

On the second day of jury selection defense counsel suggested that the judge should recuse herself as a material witness in the case. (T 377, 384-85) Counsel noted that the judge had found, in her order denying dismissal of the charges, that the officers had entered the defendant's premises without a warrant. Counsel further noted that, in apparent contradiction, the court file showed that the judge *had* signed a warrant for those premises on the date of the incident. (T 378-80) The ASA correctly noted that the warrant was a search warrant which was sought and executed after the defendant's arrest. (T 381; R 28-32) The judge declined to recuse herself. (T 381, 385)

Also on the second day of jury selection, defense counsel asked for a new jury panel, noting that in his view the panel that was questioned the day before appeared to have been hand-picked to favor the State. (T 381-82) The court denied the requested relief, stating that the venire had been drawn randomly. (T 383)

In his opening statement, defense counsel began to tell the jury about a warrant for entry on the defendant's property that through some machinations had been created and filed after the fact. (T 469-70) At the bench, the court warned

counsel that any further implication that anything shady had gone on in that regard would be disingenuous. (T 471-72)

Also in opening statement, defense counsel told the jury the evidence would show Deputy Hriciso is diabetic, had not eaten on the day of the incident, and was unduly agitated as a result. (T 462)

The State established at trial that a home health nurse visiting Appellant's neighborhood during the early afternoon of January 26, 2016 called 911, after she heard banging sounds and a woman's screams. (T 475-508) Deputies Marie Skinner and Michael Hriciso of the Brevard County Sheriff's Office responded to the area, a rural enclave in Mims. (T 525-28, 629-36) Both deputies testified that when they arrived they heard sounds similar to those described on the 911 call. (T 528-30, 636-38) According to the deputies' testimony, they announced "Sheriff's Office" and announced that whoever was fighting needed to come out of the back yard, which was surrounded by a privacy fence, to talk to them or else they would come in. (T 531-33, 548, 642-43) They both testified that an older man came to the fence, told them they were unwelcome inside without a warrant, then called out for "Skyler" to handle the matter. (T 533-34, 547-49, 642-43) Deputy Skinner testified that the man told them that Skyler was bipolar and was off his medication. (T 549) Deputy Hriciso testified that he heard no such thing. (T 697) It was

undisputed that a herd of goats kept on the property was bleating loudly during the interaction. (T 901, 928)

Skinner and Hriciso went on to testify as follows: Skyler and a young woman came to the fence. (T 549-50, 643-45) The deputies could see through the slats in the fence, but not very well. (T 532, 537, 640) Skyler was "getting very agitated... jumping around back and forth" and "just pacing back and forth like he doesn't even understand what I'm saying." (T 550, 645) The young woman climbed partway up the fence to where Deputy Skinner could see her face and neck; she told the officers to leave because she was fine, then climbed back down on her side of the fence. (T 552) The deputies again announced they would come in if no-one came out, they were again told to get a warrant, and Hriciso then pulled down a rickety segment of the fence. (T 553, 647-48) Both deputies testified that they immediately entered the yard, without any weapons drawn. (T 553-54, 649, 653)

Skinner approached the woman and Hriciso approached Skyler, who remained agitated and would not stand still. (T 554, 651) Hriciso reached out to grab Skyler in order to stop him from moving. (T 560-61, 651) The young woman ran to intervene between Hriciso and Skyler, and Deputy Skinner grabbed the woman and swung her around. (T 561, 651-52) At that juncture Hriciso heard the

distinctive sound of a metal baton being opened, then turned to see Skyler swinging it at his head like a baseball bat. (T 652-53) Deputy Skinner saw Skyler "continually" hitting Hriciso on the head and shoulder with the baton; Hriciso testified that several blows landed on his head. (T 561-62, 653-54) A single blow of the baton landed on Deputy Skinner's head. (T 566, 654-55) Both officers required treatment at the hospital. (T 572-73, 792)

Deputy Hriciso testified that the defendant apologized to him at the scene. (T 699) The defense called the defendant, Courtney Johnson (the young woman from the scene), and Michael Francis (the older man from the scene) as witnesses. Michael Francis testified that he did not hear anyone announce "Sheriff's Office," but that he thought some official had arrived to advise them of a noise complaint; he detailed Skyler to deal with the issue, as Skyler and Courtney had been having a noisy but non-violent argument. (T 927-28) The older Mr. Francis denied telling anyone to get a warrant. (T 969) He corroborated Deputy Skinner's testimony that he informed the officers Skyler was bipolar. (T 953)

Courtney testified as follows: when she climbed up the fence, the officers would have been able to see her from the waist up. (T 888-89) She came down when Skyler tugged at her from behind. (T 912) Before she climbed the fence, she did not know the questioners outside were deputies. (T 908-09) She was on her

way outside to allay their concerns when the fence came down. (T 910-13) At that point she saw a gun in the male officer's hand and saw something in the female officer's hand which she assumed was a weapon. (T 913-15) Skyler reacted with the baton when the male officer lunged at him. (T 893) Courtney only saw Skyler hit the male officer once. (T 893)

The defendant testified that his argument with Courtney was verbal rather than physical. (T 994) He further testified to the following: he did not hear a sheriff announce himself or herself, and he told no-one to come back with a warrant. (T 998, 1027) Both of the people outside the fence were free with the "f" word when they demanded entry. (T 999, 1009, 1037) He agreed with Courtney that her midsection as well as her head would have been visible from outside when she climbed the fence. (T 998) After Courtney reported to the people outside that nothing bad was going on inside, a huge aggressive man ripped the fence and rushed him with his gun drawn. (T 1000) A woman also charged through the gap in the fence with something in her hand that he thought was a weapon. (T 1054) He reacted in self-defense by swinging the baton to create space between himself and the man. (T 1002) He hit the man but without intending to, and the baton broke. (T 1002) The pieces of the baton collected at the scene were introduced into evidence. (T 737-55) The baton came from of a box of similar items which he had

bought for $2.50 apiece at the flea market. (T 1002) His reaction was purely adrenaline-induced and took place without his really registering anything but the gun being held on him. (T 1009, 1045-46) This all happened within forty seconds. (T 1014, 1020) He apologized afterward to Deputy Hriciso. (T 1023)

The court repeatedly admonished defense counsel in the jury's presence. (T 133, 541, 833, 893-94, 955, 1300-01) During the defendant's testimony, the judge sent the jury out and admonished him twice to "wipe that smirk off your face." (T 987-90) Also during the defendant's testimony, defense counsel asked him if he is bipolar; the State immediately objected on relevance grounds, and the objection was sustained. (T 1059) During Deputy Skinner's cross-examination, defense counsel sought to ask "how would you normally deal [with the situation] if you knew that a person was bipolar and on medication?" (T 601-02) The State objected on relevance grounds, and the objection was sustained. (T 602) Deputy Hriciso, during his cross-examination, denied that he is or was at any relevant time diabetic. (T 695)

The parties held their charge conference at the close of the evidence. (T 1073-1235) The defense submitted, as its request for a jury instruction on self-defense, copies of Sections 776.031 and 776.051 of the Florida Statutes in their entirety. (T 1152-55) The ASA objected, noting that since the defense had not

supplied a tailored written version of Standard Instruction 3.6(f), which deals with use of deadly force, he had written up what he believed was an appropriate version of that standard instruction. (T 1153-55, 1117-18) The only mention made of non-deadly force at the charge conference, or at any time, was defense counsel's question "so we're just using deadly force?" (T 1165) The State and court responded "yes," noting that the information had charged the use of deadly force. (T 1165) The parties agreed the instruction would set out that deadly force could be found warranted by the jury if an officer appeared to be about to commit aggravated battery, aggravated assault, or burglary with a battery or assault therein. (T 1178-82, 1192)

The defense proposed more language for the self-defense instruction, to the effect that under the governing caselaw, exigent circumstances permit officers to enter private premises to preserve life or render first aid, provided they do not enter with an accompanying intent to either arrest or search. (R 298; T 1156-59) The State objected, arguing that the instructions on the elements of the charges covered the same ground, in that as to both counts the jury had to determine whether the officers were acting in the lawful performance of a legal duty. (T 1156-57) The defense argued that the proposed language would assist the jury in making that very determination. (T 1158) The court declined to read the proposed

paragraph, ruling that the subject matter was not proper in a jury instruction since any Fourth Amendment issue had been resolved prior to trial. (T 1159)

In its closing, the defense argued that Skyler had defended his home against an unlawful break-in. (T 1313) In its closing, the State conceded that a yard can be burglarized, and clarified that the self-defense instruction, by its terms, only allowed the defendant to seek to defend against a burglary if an assault or battery were about to be committed therein. (T 1269, 1266-67)

Also in closing, the State argued the defendant was less than straightforward with the jury since he kept stopping to think about his answers. (T 1341-42) The ASA further dismissed the defendant's testimony as "whatever he was trying to tell you" (T 1249), and argued five times that his testimony was unreasonable or made no sense. (T 1257, 1272, 1274-75, 1351, 1357)

The State also pointed out that self-defense is not available to those who are engaged in a crime, and "suggest[ed]" to the jury that Skyler had been so engaged before the officers arrived, "which is why law enforcement officers were there to investigate." (T 1267-68) The only fact the State relied on to support that speculation was that Courtney admitted the defendant had tugged her to indicate she should get down from the fence, "[s]o we know that there is something horrid going on with this situation that law enforcement is there to deal with." (T 1349)

The jury was instructed, for the most part, in accordance with the standard jury instructions. (R 255-88; T 1357-92) The written and oral instructions differed from the agreed-on instructions on one point: the parties agreed during the charge conference that the defendant could argue he was forestalling a list of offenses which included burglary with an assault or battery, but the instructions actually given stated that any burglary being prevented must have foreseeably included an *aggravated* battery or an *aggravated* assault. (T 1182, 1192, 1378; R 276)

The jury deliberated for over four and a half hours. (R 314-15) During that time it asked to, and did, hear again all of the testimony about what transpired between the time the fence came down and the time the baton came down. (T 1400, 1409-10, 1413-14, 1417-18) Its verdict on Count I was guilty of the lesser included offense of attempted manslaughter of Deputy Hriciso, and on Count II it found the defendant guilty as charged of aggravated battery on Deputy Skinner. (T 1424; R 289-90)

The verdicts were returned November 1, 2018 (R 290), and Appellant was adjudicated guilty in accordance with them. (T 1427-28; R 316) On November 6, a motion for new trial was timely filed, then amended November 13. (R 319-20, 364-70) The amended motion argued that the defense was not given adequate time to prepare for trial, thus rendering counsel constitutionally ineffective. (R 364)

The motion further argued that the defense's written proposed special jury instructions should have been given. (R 365) It further asserted that the judge had been "visibly hostile" toward defense counsel and toward the defendant himself, and throughout the proceedings had lacked the patience, dignity and courtesy owed to litigants. (R 367-68) The motion was denied in a written order which contained no findings or discussion. (R 398)

The defense also filed a motion seeking a downward departure sentence. (R 409-12) The motion alleged that the defendant's capacity to appreciate the criminal nature of his conduct, or to conform his conduct to the requirements of law, was substantially impaired, due to blood sugar irregularities (R 409); that he was amenable to, and required, treatment for "multiple mental disorders" (R 409); that he had acted out of duress or necessity (R 410); and that the victims had initiated or provoked the incident that gave rise to the charges. (R 410)

The sentencing hearing was held on December 17. (SR 939-1008) Counsel noted, without contradiction, that the PSI prepared for this case stated that Skyler might benefit from a more intensive mental-health examination than he had yet received. (SR 973, 984) The judge noted that she was consulting her copy of the PSI, but did not otherwise respond as to whether she perceived a need for a more intensive examination. (SR 972, 984-85)

The defense called as witnesses family members and a family friend who testified that the defendant had never been violent in their experience with him. (SR 959-66) Counsel asserted on the record that the defendant "has some mental issues" (SR 971), and that his conduct had been "driven by paranoia and...his misguided mental state." (SR 985) Counsel called no witness, and introduced no exhibit, in support of the "capacity to conform" or "amenable to treatment" grounds for departure asserted in the motion. Counsel argued that the incident was an isolated one. (SR 973) The scoresheet prepared by the State corroborates that assertion, in that it indicates that Appellant has only one prior conviction, for the misdemeanor of resisting an officer without violence. (R 496) The defendant expressed remorse both at the scene and at the sentencing hearing. (T 699; SR 980) No argument was made that his conduct bore the earmarks of a lack of sophistication.

The State argued that the defense had failed in its burden of showing that a mental health-related ground for downward departure applied. (SR 986-89, 991) The State further argued that to the extent the evidence at trial tended to show duress, or tended to show that the victims provoked the incident, the jury had rejected both positions by its verdicts. (SR 990-91)

The State noted that the scoresheet it had prepared required a minimum stay

of 51.15 months in the Department of Corrections, and further noted that Count II carries a minimum mandatory term of 60 months. (SR 991-92) Judge Lemonidis responded that the scoresheet would have included a 1.5 multiplier to reflect the victims' status as law enforcement officers if Count II had been scored as the primary offense. (SR 993-95) The State announced, without objection, that it was recalculating the scoresheet. (SR 995-96, 1002) The scoresheet in the record reflects the change, which yielded a minimum sentence of 87.225 months in prison. (SR 995-96, 1002; R 496-97)

The judge found that a downward departure was neither supported by the evidence nor appropriate in the case. (SR 998) She further found as follows:

> THE COURT: [The incident] took a period of time...you had plenty of time to make a rational decision, sir. And the decision you made was to whip out - don't shake your head at me, because I'm finding the facts now, sir. And you can wipe that grin right off your face, or save it for the folks in the Department of Corrections. ...I find...that you have absolutely violated the very premise upon which the fabric of our society sleeps at night, and that is you have attacked the people that are there to protect you. ...And had you been doing something that was one hundred percent law abiding...I couldn't imagine that such a gracious person would have had a problem with the police coming on in and having a look around or doing whatever it was they felt was necessary under the circumstances, because you wouldn't have been doing anything wrong.

(SR 999-1000)

The court sentenced Appellant to the maximum term of five years in prison for the attempted manslaughter of Deputy Hriciso, and to a consecutive ten years

in prison, to be followed by fifteen years on probation, for the aggravated battery on Deputy Skinner. (SR 1000-01; R 499-503) The court announced a special probation condition requiring a mental health evaluation and followup with any recommended treatment, because “the question of mental health has been raised over and over, and the behavior does raise the question in and of itself to a small degree.” (SR 1001-02) The court specified that Appellant must schedule himself, within 20 days of his release, for the evaluation. (SR 1004) The defendant asked if his mental health could be evaluated while he was still in prison, and the judge responded “no, sir.” (SR 1004)

Timely notice of appeal from the judgment and the December 17 sentencing order was filed on January 4, 2019. (SR 529)

SUMMARY OF ARGUMENTS

Point one. Generally, denial of a motion to continue will not be disturbed on appeal unless there has been a palpable abuse of discretion. However, criminal defendants are entitled to a preparation period sufficient to assure at least minimal quality of counsel. The courts apply a seven-factor test that balances the need for adequate preparation in criminal cases against the need for the courts' efficiency. Application of the seven-factor test weighs against the State in this case.

Point two. When counsel at sentencing argued that a more comprehensive mental-health evaluation would be beneficial, the court should have treated the assertion as a motion for continuance and for re-appointment of a mental-health expert, and should have granted the motion. The judge - *before* choosing a sentence, rather than afterward - should have allowed further inquiry into mental-health issues which she knew about, and which may have affected the defendant's perceptions and responses during the incident that gave rise to the charges.

Point three. Defense counsel's performance at trial and sentencing was unacceptable under prevailing professional norms. Prejudice sufficient to undermine confidence in the outcome followed from his failure to request a non-deadly force instruction alone. The record as a whole reflects a breakdown of the adversarial process, and reversal and remand for a new trial are warranted.

Point four. A special paragraph which the defense sought to add to the deadly-force instruction should have been read. It would have conveyed that under the governing law, exigent circumstances permit police officers to enter private premises to preserve life or render first aid, provided they do not enter with the additional intent either to arrest or search. The special requested instruction was supported by the evidence and was a correct statement of law. Further, the subject matter was not covered by the existing instructions, but instead would have added to the jurors' understanding of a determination they were required to make.

The self-defense instruction was further flawed in that the version which was read and provided to the jurors departed materially from the version agreed to at the charge conference. The version the jury received added an element to what the defense must prove. Where only one affirmative defense is presented in a criminal trial, and where the jury might have found reasonable doubt based on that theory but might have still found the defendant guilty because of a flaw in the instruction that sets out the defense, the defendant has been deprived of a fair trial. That possibility is present on this record.

Point five. The judge departed from her neutral role by helping the State and by relying on an improper sentencing consideration.

ARGUMENTS

POINT ONE

JUST-RETAINED DEFENSE COUNSEL SOUGHT A CONTINUANCE OF THE TRIAL. THE COURT ABUSED ITS DISCRETION BY DENYING THE MOTION.

Preservation. The argument now made was raised and rejected below. (R 203, 364, 398; SR 885-901)

Standard of review. Generally, denial of a motion to continue is within the discretion of the trial court, and the ruling will not be disturbed on appeal unless there has been a palpable abuse of discretion. Boffo v. State, 272 So. 3rd 867, 878 (Fla. 5th DCA 2019). However, criminal defendants are entitled to a preparation period sufficient to assure at least minimal quality of counsel. Id. *See* Trocola v. State, 867 So. 2d 1229, 1230-31 (Fla. 5th DCA 2004) (when further preparation time is sought and denied, either abuse of discretion or prejudice to the rights of the accused warrants reversal).

Argument. The courts apply a seven-factor test that balances the need for adequate preparation in criminal cases against the need for the courts' efficiency. Boffo, 272 So. 3rd at 878, *citing* Trocola. The test is to be applied both by the trial court that considers a motion based on inadequate preparation time, and by the appellate court reviewing denial of such a motion. Id. The seven factors are (1) the

time actually available for preparation; (2) the likelihood of prejudice from the denial; (3) the defendant's role in shortening preparation time; (4) the complexity of the case; (5) the availability of discovery; (6) the adequacy of counsel actually provided; and (7) the skill and experience of chosen counsel, and his pre-retention experience with the client or the case. Boffo at 878 n.2.

This court reversed the conviction in Boffo where the trial court failed to give certain of the seven factors due consideration. 272 So. 3rd at 878. *See also* Madison v. State, 132 So. 3rd 237, 245 (Fla. 1st DCA 2013) (failure to consider the factors militates against affirmance). In Boffo, the trial court considered the case uncomplicated and saw no reason why one public defender could not stand in for another who had been deployed overseas. Here the court considered the case uncomplicated in that there was no scientific controversy involved; defense counsel argued that the case was a winnable one which was likely to be tried over a period of several days, and that while a month's time was insufficient for him to be fully prepared, he sought only a continuance until the following trial period. That position was not unreasonable: while the testimony in this case would consist primarily of the eyewitnesses' competing versions of events, and while there is no indication in the record that discovery was not scrupulously provided to incoming counsel, there were complicating factors in the case. Defense counsel had the task

of persuading a jury that two injured officers' proactive entry onto private property was the behavior to be deterred in the case, rather than the defendant's reaction to it. Counsel further had to contend with how to add to the mix a psychologist's finding that the defendant appeared to him to be somewhere on the autism spectrum, given Florida's strict limitations on the use of psychologists' proof in defense of a criminal case. *See generally* Beckman v. State, 230 So. 3rd 77, 87-89 (Fla. 3rd DCA 2017).

The judge in this case focused on the length of time the case had been on the docket, as well as on her view that the matter was relatively simple. The age of a case is merely the starting point for the seven-factor inquiry. *See* Madison, *supra*, 132 So. 3rd at 243. It is also clear, from the transcript of the calendar call held the day new counsel was hired, that the court intended to bring the case to trial as quickly as possible given potential "client control" problems stemming from the defendant's growing agitation. The latter consideration is not one of the factors recognized in Trocola and Boffo.

The State argued that Appellant was manipulating the system by seeking new counsel whenever trial was imminent. The record does not support that view of the case. It appears from the record that the young defendant's family dismissed original counsel after two years of relative inactivity, and it is clear that the

assistant public defender who was afterward assigned to the case declined, in cavalier fashion, to speak with his client at the September 2018 docket sounding even though their last motion to continue the trial had just been denied. Retaining a second law firm in light of that conduct cannot fairly be attributed to a desire to cause disruptive mischief. *See* Madison at 243 (client's good faith concern with quality of existing representation did not weigh against a continuance).

As of September 2018, when counsel filed his emergency motion for continuance, Appellant was facing two first-degree felony charges. The potential prejudice to his interests in having unprepared counsel handle his case was significant. *See* Madison, *supra*, 132 So. 3rd at 245, *citing* Brown v. State, 66 So. 3rd 1046, 1049 (Fla. 4th DCA 2011). The State did not point to any logistical difficulties in coordinating travel for out-of-circuit witnesses; at trial it would rely almost exclusively on local law enforcement personnel.

Application of the seven-factor test weighs against the State:

1) The time actually available for incoming counsel to prepare was just under a month. Discovery was complete but, as noted, the case - which involved respected victims - challenged defense counsel to craft a defense out of elements of duress, abuse of official power, self-defense, and diminished capacity to control responses to fast-breaking events.

2) The likelihood of prejudice from going forward with unprepared counsel was great, as Appellant was exposed to 35 years' potential imprisonment. *See* Madison v. State, 132 So. 3rd 237, 245 (Fla. 1st DCA 2013) and Brown v. State, 66 So. 3rd 1046, 1049 (Fla. 4th DCA 2011).

3) The defendant's role in shortening preparation time should not be held against him, since concerns on his part about the representation being provided by the public defender's office, which was abruptly replaced in September of 2018, are supported by the record. *See* Madison at 243.

4) As the court noted, the case was not complex to try in that there was no battle of experts involved. However, as also noted at paragraph one above, the case was not an easy one to prepare to defend.

5) The record does not suggest there were any difficulties involved in transferring discovery from outgoing to incoming counsel.

6) The adequacy of counsel actually provided does not weigh in favor of the State, since incoming counsel appears from the record not to have mastered the difficulties presented by the case. *See* Point Three *infra*.

7) It does not appear from the record that incoming counsel had any pre-retention relationship with the defendant or the case.

Adequate time to prepare a defense is inherent in due process, as well as in the right to counsel. Taylor v. State, 958 So. 2d 1069 (Fla. 4th DCA 2007). The constitutional right to counsel is denied by "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." United States v. Sellers, 645 F. 3rd 830, 834 (7th Cir. 2011). This court should reverse the convictions appealed from, and remand for a new trial.

POINT TWO

COUNSEL AT SENTENCING SOUGHT A MORE SEARCHING MENTAL-HEALTH EXAMINATION THAN HAD PREVIOUSLY BEEN CONDUCTED. THE COURT ABUSED ITS DISCRETION BY TAKING NO ACTION ON THE REQUEST.

Preservation. Counsel took the position at the sentencing hearing that a more searching mental-health examination would be beneficial; the judge did not respond.

Standard of review. Denial of a continuance for sentencing, as with trial, is within the sound discretion of the trial court. *E.g.*, Cheatham v. State, 346 So. 2d 1218 (Fla. 3rd DCA 1977).

Argument. Counsel's urging in favor of a more comprehensive mental-health evaluation should have been treated as a motion for continuance and for re-

appointment of a mental-health expert. Downward departure was sought on multiple grounds, including (a) that on the date of the offense Appellant's capacity to appreciate the criminal nature of his conduct was impaired; (b) that on that date his capacity to conform his conduct to legal requirements was impaired; and (c) that he is amenable to, and requires, treatment for "multiple mental disorders." The case, of course, involved an overreaction to startling events. Expert testimony could have been adduced regarding the defendant's level of culpability, although Florida's strict rule regarding diminished capacity was in effect during the jury trial; a court may depart downward for a reason which could not lawfully have been put forth at trial as a defense to the charges. State v. Rife, 733 So. 2d 541 (Fla. 5th DCA 1999)(en banc), *approved*, 789 So. 2d 288 (Fla. 2001). *See* Matlaga v. State, 764 So. 2d 922 (Fla. 4th DCA 2000), where the DCA held the trial court erred in refusing to continue sentencing so that medical records could be obtained, although the DCA also held that the record of the trial showed defendant was sane at the time of the offenses. As noted above, "an unreasoning and arbitrary insistence upon expeditiousness" can amount to a violation of the rights to due process and effective counsel. *See generally* United States v. Sellers, 645 F. 2d 830, 834 (7th Cir. 2011).

Counsel asserted at the sentencing hearing that Appellant's conduct was

"driven by paranoia and...his misguided mental state." (SR 985) However, counsel called no witnesses, and introduced no exhibits, in support of the proposed grounds for departure, and the State prevailed by arguing that the defense had failed to show entitlement to relief. Here as in Weible v. State, 761 So. 2d 469 (Fla. 4th DCA 2000), the court was on notice that more information could have, and should have, been part of its sentencing decision. In Weible, a successor judge declined to hear an updated evaluation of the defendant's mental health, based on the judge's conclusion that the crime was motivated by revenge and that mitigation was therefore inappropriate; the DCA reversed, finding a palpable abuse of discretion. 761 So. 2d at 471-73. In this case, Judge Lemonidis was on notice that mental health-related issues could not reasonably be ignored: close to a year before sentencing, the question of Appellant's competency to assist counsel was referred to a psychologist who expressed frustration that he had been provided with no school or medical records. That doctor's report informed the court that Appellant appears to fall somewhere on the autism spectrum, and the proof at trial included a statement that he is bipolar *and* that before the incident he had gone off a medication regime prescribed for that disorder. Further, the month before the case went to trial, the judge agreed with counsel on the record that the defendant appeared to be losing his composure.

At the end of the sentencing hearing, the judge announced a special probation condition that requires a mental health evaluation and followup with any recommended treatment. The court stated, as its reason for that special condition, that "the question of mental health has been raised over and over, and the behavior does raise the question in and of itself to a small degree." (SR 1001-02) On this record, it behooved the trial court *before* choosing a sentence, rather than afterward, to allow a serious inquiry into mental-health issues that may have affected the defendant's perceptions of, and response to, a sudden invasion of his family's privacy. *See* Weible, 761 So. 2d at 471-73. Reversal of the sentence appealed from, and a remand for further proceedings, is warranted.

POINT THREE

THE RECORD SHOWS THAT COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE.

Preservation. The issue raised on this point was preserved in part, when defense counsel asserted in his motion for new trial that he had been unable to be effective because of the court's denial of a continuance for trial.

Standard of review. The standard of review of an order denying a new trial is, in the usual case, whether the court abused its discretion. *E.g.,* Ferebee v.

State, 967 So. 2d 1071, 1073 (Fla. 2d DCA 2007). Where questions of constitutionally ineffective assistance of counsel are raised on the record in a direct appeal, the courts consider whether there has been a breakdown in the adversarial process sufficient to undermine confidence in the outcome. *See* Spicer v. State, 22 So. 3rd 706, 708 (Fla. 5th DCA 2009).

Argument. Defense counsel argued to the jury in closing that there was a reasonable doubt whether the force used by Appellant was deadly, but counsel did not ask the court to give the standard instruction on use of *non-deadly* force, or any variation on it. Where the only defense to a battery charge is self-defense, and where the record does not establish as a matter of law that the force used was deadly, the defendant is entitled to the standard jury instructions on *both* deadly and non-deadly force. DeLuge v. State, 710 So. 2d 83 (Fla. 5th DCA 1998). The only type of force deemed deadly as a matter of law by the Florida courts is discharge of a firearm. Copeland v State, no. 5D18-2869, slip op. at 5 (Fla. 5th DCA August 23, 2019). Here as in Michel v. State, 989 So. 2d 679 (Fla. 4th DCA 2008), the weapon involved could have been used in either a deadly or a non-deadly manner and the testimony differed as to the degree of force used, yet counsel did not seek a non-deadly force instruction. Here, as in Michel, ineffective assistance of counsel should be found on the face of the record. Accord Copeland,

slip op. at 8; Marty v. State, 210 So. 3rd 121 (Fla. 2d DCA 2016); McComb v. State, 174 So. 3rd 1111 (Fla. 2d DCA 2015).

At trial, the court and jury heard the defendant apologized at the scene; at sentencing, the court again heard the defendant express remorse. It was undisputed below that the incident which gave rise to the charges was an isolated one, in that the defendant has only one prior misdemeanor conviction. However, counsel did not also argue that the proof showed a relatively unsophisticated course of criminal conduct, although those three factors together make up a statutory ground for downward departure. *See* Section 921.0026(2)(j), Fla. Stat. (2016). Waiving a legal issue can amount to ineffective assistance cognizable from the record on direct appeal. Sommers v. State, 829 So. 2d 379 (Fla. 3rd DCA 2002).

As noted on Point Two, counsel failed to adduce evidence in support of the mental health-related aspects of the motion for downward departure. The question raised on this point is whether a reasonably effective lawyer would have done the same. *See* Sierra v. State, 230 So. 3rd 48, 51 (Fla. 2d DCA 2017). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id., *quoting* Strickland v. Washington, 466 U.S. 668, 669 (1984). However, the presumption is rebuttable: the judgment or strategy of counsel must be objectively sound. Id. Patently unreasonable decisions, although

tactical, are not immune from challenge. Sierra at 51.

The motion for downward departure also urged that the victims had initiated or provoked the incident, and that the defendant had acted under duress. The State's position was that the jury, by its verdicts, had necessarily rejected both arguments. Given the wording of the jury's instructions, this is by no means the case as to either of those potential departure reasons, yet defense counsel made no response to the State's argument. Failure to raise an obvious defense can also amount to constitutionally ineffective assistance on the face of the record, where, as here, "a tactical explanation for the conduct is inconceivable." Larry v. State, 61 So. 3rd 1205, 1207 (Fla. 5th DCA 2011).

Counsel also failed to adduce evidence in support of his claim, made in his opening statement to the jury, that Deputy Hriciso is diabetic and that he quite possibly acted based on his blood-sugar level when he brought down the fence at the Francis property. That claim was made in aid of the legal position that the officers did not act lawfully in the course of a legal duty, which was an element of both charged offenses. Prejudice in the eyes of the jury no doubt ensued when, during Hriciso's cross-examination, the deputy denied he had ever been diabetic and the inquiry was not followed up. *See* Dames v. State, 807 So. 2d 756, 758 (Fla. 2d DCA 2002). Similarly, any semblance of useful rapport between counsel

and the court was lost early on in the case, when counsel argued the venire had been hand-picked to favor the State, and accused the judge of some sort of chicanery in that she signed a warrant allowing officers to re-enter the Francis home after Appellant's arrest. *See generally* State v. Dougan, 202 So. 3rd 363, 388-89 (Fla. 2016) (prejudice sufficient to undermine confidence in the outcome ensued from multiple admonitions by the court in the jury's presence.)

Counsel's failure to request a non-deadly-force instruction, in itself, resulted in prejudice sufficient to warrant reversal. Copeland; Marty; McComb; Michel. As to counsel's performance in general, the undersigned entreats this court to read the entire transcript of the trial and the sentencing so as to appreciate the full flavor of counsel's eccentric contributions to the proceedings. This court's usual inquiry when this issue is raised, *i.e.*, whether the record reflects a breakdown in the adversarial process, should be answered "yes" on the record of this case. *See generally* Spicer and Dougan, *supra; accord* Sierra, *supra,* 230 So. 3rd at 52. Reversal of Appellant's convictions, and a remand for a new trial, is warranted. If that relief is not forthcoming, reversal of Appellant's sentence and remand for a new sentencing proceeding is in order.

POINT FOUR

THE SELF-DEFENSE INSTRUCTION THE JURY HEARD WAS FLAWED.

A. ON THIS RECORD, IT WAS ERROR TO DENY THE PROPOSED SPECIAL INSTRUCTION SETTING OUT WHEN EXIGENT CIRCUMSTANCES PERMIT OFFICERS TO ENTER A HOME.

Preservation. The issue raised on this sub-point was preserved by a written request for a special jury instruction which was denied by the court. (R 298; T 1156-59)

Standard of review. The appellate courts review *de novo* whether a special jury instruction should have been given. Rockmore v. State, 140 So. 3rd 979, 983-84 (Fla. 2014). A criminal defendant is entitled to a special instruction where the record shows (1) that the special instruction was supported by the evidence, (2) that the standard instructions did not adequately cover the theory of defense, and (3) that the special instruction was a correct statement of the law and not misleading or confusing. Stephens v. State, 787 So. 2d 747, 755-56 (Fla. 2001).

Argument. The language proposed by the defense would have conveyed that under the governing caselaw, exigent circumstances permit officers to enter private premises to preserve life or render first aid, provided the officers do not enter with the additional intent to either arrest or search. The trial court ruled that

the subject matter was not proper in a jury instruction since any Fourth Amendment issue had been resolved prior to trial.

The special requested instruction was supported by the evidence. The jury was obliged to decide, as to both counts, whether the officers were lawfully engaged in a legal duty when Deputy Hriciso pulled down the fence surrounding Appellant's property. The point was hotly disputed at trial. "The office of an instruction to the jury is to enlighten the jury upon questions of law pertinent to the issues of fact submitted to them." Cliff Berry, Inc., v. State, 116 So. 3rd 394, 407 (Fla. 3rd DCA 2012), *citing* Edwards v. Fitchner, 104 Fla. 52, 139 So. 585, 586 (1932). What the law allows officers to do in exigent circumstances is *pertinent to* whether particular officers were lawfully acting in performance of a legal duty. *See* Espiet v. State, 797 So. 2d 598 (Fla. 5th DCA 2001).[2]

The proposed language was also a correct statement of law. *See* Sosnowski v. State, 245 So. 3rd 885 (Fla. 1st DCA 2018), where the court held that exigent circumstances excusing an official entry into a private backyard must be based on more than the beliefs that a misdemeanor has taken place and that an arrest should follow.

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[2] Espiet holds that one may not resort to force to resist an illegal arrest, even in the home. That holding is not dispositive here, since the jurors had to decide whether the officers at the time of entry reasonably appeared to be officers, and had to decide whether the defendant was opposing what appeared to be a forcible felony.

The State did not argue that the proposed special instruction did not correctly characterize the controlling law, but instead argued that the standard instructions covered the same ground in that the standard instructions *asked the jury to determine,* as to each count, whether the officers were acting lawfully. The non-standard language proposed by the defense would have helped the jurors *answer* that question. The proposed language did not cover the same ground as the existing instructions, but instead supplemented the jurors' understanding of a determination they were required to make. The special requested instruction should have been given. Stephens, *supra*. "It is an inherent and indispensable requisite of a fair and impartial trial, under the protective powers of or Federal and State Constitutions...that a defendant be accorded the right to have a Court correctly and intelligently instruct the jury." Jackson v. State, 832 So. 2d 773, 776 (Fla. 4th DCA 2002). *See also* Motley v. State, 20 So. 2d 798, 800 (Fla. 1945) (criminal defendants have a right to correct instructions on the theory of defense as well as the elements of the charges).

B. THE WRITTEN AND ORAL DEADLY-FORCE INSTRUCTIONS DIFFERED FROM THE AGREED-ON INSTRUCTIONS. THE CHANGE AMOUNTED TO FUNDAMENTAL ERROR IN THAT IT MAY HAVE PRECLUDED THE JURY FROM FINDING THAT SELF-DEFENSE WAS SHOWN.

Preservation. The issue argued on this sub-point was not argued below.

Standard of review. Misstating the law in a jury instruction that sets out an affirmative defense amounts to fundamental error where the defendant is thereby deprived of a fair trial. Martinez v. State, 981 So. 2d 449, 455-56 (Fla. 2008). Where self-defense is the only affirmative defense presented at a criminal trial, and where the jury may have found reasonable doubt based on that theory but may have still found the defendant guilty because of a flaw in the self-defense instruction, the defendant has been deprived of a fair trial. Fields v. State, 988 So. 2d 1185, 1189 (Fla. 5th DCA 2008).

Argument. The parties agreed during the charge conference that the jury would be told that the defense of self-defense was available if Appellant acted to forestall a list of offenses which included a burglary with an assault or battery. However, the instructions actually given stated that for self-defense protections to apply, any burglary being prevented must have foreseeably included an *aggravated* battery or an *aggravated* assault. The jurors, during their lengthy deliberations, may have abandoned consideration of whether the self-defense

theory created a reasonable doubt, if they found the officers were unarmed on entering or if they found the officers were never in a position to cause great bodily harm. In either case, the defendant was deprived of a fair trial pursuant to Fields and Martinez. *See also* Jackson, *supra* (right to correct instructions has a constitutional dimension); Motley, *supra* (right to correct instructions in criminal case includes instructions on affirmative defenses). Reversal of both convictions, and remand for a new trial, should follow.

POINT FIVE

THE COURT ANNOUNCED IMPROPER SENTENCING CONSIDERATIONS, AND ABANDONED ITS NEUTRAL ROLE.

Preservation. The argument raised on this point was preserved in part, when defense counsel argued in the motion for new trial that the court departed from its neutral position.

Standard of review. As noted, the usual standard of review of an order denying a new trial is whether the court abused its discretion. *E.g.,* Ferebee v. State, 967 So. 2d 1071, 1073 (Fla. 2d DCA 2007). When judicial neutrality is breached, fundamental error results. Williams v. State, 160 So. 3rd 541, 544 (Fla. 4th DCA 2015), *citing* Lyles v. State, 742 So. 2d 842 (Fla. 2d DCA 1999).

When a trial court considers an improper factor in sentencing, and the

appellate court cannot say that the sentence would be the same without the impermissible consideration, the sentence will be vacated on a fundamental-error basis even if it falls within statutory limits. Kenner v. State, 208 So. 3rd 271, 277 (Fla. 5th DCA 2016).

Argument. The judge in this case advised the State just how it could re-score the criminal punishment code scoresheet so as to achieve a longer presumptive sentence. Similar displays of partiality have resulted in the appellate courts concluding that a judge impermissibly departed from his or her appropriate neutral role. *See* Williams, *supra*, reversing where the judge "entered the fray" by advising the State it could seek rehearing of a predecessor judge's order. 160 So. 3rd at 543-44. In Lyles, *supra*, where similar *sua sponte* pro-State intervention took place, the Second DCA held the court had "deprived [the defendant] of one of the essentials of due process, an impartial magistrate." 742 So. 2d at 843. Fundamental error should be found on this record, as it was in Williams and Lyles.

The judge further told the defendant in open court, no fewer than three times at both trial and sentencing, to "wipe that grin" or "wipe that smirk" off his face. Public records show that Judge Lemonidis has agreed with the Judicial Qualifications Commission to accept a public reprimand regarding her demeanor in this case and in an unrelated case. *See* the JQC's Amended Findings and

Recommendation of Discipline, filed August 5, 2019 in Inquiry Concerning a Judge, the Honorable Robin C. Lemonidis, no. SC19-1302, at p. 10. The JQC emphasized that the judge in this case "adoped an inappropriately adversarial tone and demeanor when addressing the defendant and his attorney," and further found that "the intemperate and inappropriate conduct by Judge Lemonidis permeated the entirety of the trial." Amended Findings and Recommendation at 2-3. The parties expressly agreed in the JQC matter that the judge's conduct during the Francis trial "created the appearance of bias." Amended Findings and Recommendation at p. 5.

Further, the judge concluded that Appellant had committed a crime before the deputies arrived at his home, on the theory that he would have welcomed police inside had he not felt guilty of something. This court has reversed on a fundamental-error basis where, as here, a sentencing judge took into account his or her belief that the defendant had committed uncharged crimes. Berben v. State, 268 So. 2d 235, 237-38 (Fla. 5th DCA 2019), *citing* McGill v. State, 148 So. 3rd 531 (Fla. 5th DCA 2014) and Epprecht v. State, 488 So. 2d 129 (Fla. 3rd DCA 1986). That relief is no less warranted on the record of this case.

Given the pervasive quality of inappropriate judicial demeanor at the trial, the defendant should be granted a new trial on this point and on the other points

raised in this brief. If that relief is not forthcoming, a new sentencing hearing should be ordered.

POINT SIX

CUMULATIVE ERROR WARRANTS REVERSAL.

Standard of review. A cumulative error claim asks the appellate court to evaluate individual claims of error cumulatively, to determine if together they require a new trial. Harrison v. Gregory, 221 So. 3rd 1273, 1278 (Fla. 5th DCA 2017).

Argument. When multiple errors appear in the record of a criminal case, a review of their cumulative effect is appropriate. McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007). Even where competent, substantial evidence supports the verdict, and even where the individual errors raised could be considered harmless in isolation, their cumulative effect may be such as to deny the defendant the fair and impartial proceeding that is his inalienable right. Id.; *accord* State v. Dougan, 202 So. 3rd 363, 390 (Fla. 2016) and Fuller v. State, 257 So. 3rd 521, 533-34 (Fla. 5th DCA 2018).

In Fuller v. State, this court reversed a conviction where a jury-instruction error combined with evidentiary errors - which themselves had resulted in "the State inappropriately attacking Fuller's character before the jury" - amounted to

cumulative error. 257 So. 3rd at 533. In State v. Dougan, the supreme court approved a trial court's order granting post-conviction relief on cumulative-error grounds, where constitutionally ineffective assistance of counsel had combined with prosecutorial misconduct to deny a fair trial. 202 So. 2d at 389. A similar resolution is warranted by the record of this case, where ineffective assistance of counsel, combined with the other errors set out above, ultimately resulted in a deeply flawed proceeding. Mr. Francis has not yet received the fair trial and sentencing he is entitled to, and reversal should result.

CONCLUSION

This court should reverse the judgment and sentence appealed from, and remand for a new trial on the grounds argued at Points One, Three, Four and Five above. If that relief is not forthcoming, this court should reverse the sentencing order appealed from and remand for a new sentencing hearing on the grounds raised at Points Two, Three, and Five above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing amended initial brief has been served on Assistant Attorney General Kristen Davenport, by an email to crimappdab@myfloridalegal.com, and mailed to Appellant on this 21st day of October, 2019.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Florida Rule of Appellate Procedure 9.210(a)(2), in that it is set in Times New Roman 14-point font.

s/ Nancy Ryan
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