Application for Nomination to the Circuit Court 18th Judicial Circuit

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Kathryn Speicher

APPLICATION FOR NOMINATION TO THE CIRCUIT COURT

Instructions: *Respond fully to the questions asked below. Please make all efforts to include your full answer to each question in this document. You may attach additional pages, as necessary, however it is discouraged. In addition to the application, you must provide a recent color photograph to help identify yourself.*

Full Name: Kathryn Michele Speicher Social Security No.:

Florida Bar No.: 0021855 Date Admitted to Practice in Florida: 4/27/2006

1. Please state your current employer and title, including any professional position and any public or judicial office you hold, your business address and telephone number.

   State Attorney's Office – 18th Judicial Circuit
   Assistant State Attorney
   Career Criminal and Firearms Unit
   2725 Judge Fran Jamieson Way, Building D
   Viera, FL 32940
   (321) 617-7510

2. Please state your current residential address, including city, county, and zip code. Indicate how long you have resided at this location and how long you have lived in Florida. Additionally, please provide a telephone number where you can be reached (preferably a cell phone number), and your preferred email address.

   Brevard County, FL

   I have lived at this address for approximately three (3) years. I have lived in Florida my entire life, minus three (3) months that I lived in Silver Spring Maryland in 2000 while interning in Washington, D.C.

   I may be reached on my cell phone at

   My preferred email address is kspeicher@sa18.org

3. State your birthdate and place of birth.

   I was born on in Leesburg, FL.

4. Are you a registered voter in Florida (Y/N)?

   Yes

5. Please list all courts (including state bar admissions) and administrative bodies having special admissions requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have ever been suspended or resigned. Please explain the reason for any lapse in membership.

Florida Bar, admitted to practice on April 27th, 2006. I have never been suspended nor have I resigned.

6. Have you ever been known by any aliases? If so, please indicate and when you were known by such alias.

Prior to marrying my husband on March 8, 2008, I was known as Kathryn (Kathy) Manley.

After my marriage, I am commonly referred to as Kathy Speicher, or "Speicher" for short.

EDUCATION:

7. List in reverse chronological order each secondary school, college, university, law school or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, the date the degree was received, class standing, and graduating GPA (if your class standing or graduating GPA is unknown, please request the same from such school).

Name	Dates Attended	Degree Received	Class Standing	GPA
Stetson University College of Law	01/03 to 12/05	Juris Doctor; Leadership Development Certification	63 / 102	2.823
Stetson University	05/04 to 12/05	Master of Business Administration	None given	3.83
University of Florida	01/00 to 08/01	Master of Agri-Business	None given	3.5
University of Florida	08/96 to 12/99	Bachelor of Science (Food and Resource Economics, Emphasis Agri-Business Management)	None given	3.5
Umatilla High School	08/92 to 05/96	Academic Scholar High School Diploma	3 / 105	4.0556

8. List and describe any organizations, clubs, fraternities or sororities, and extracurricular activities you engaged in during your higher education. For each, list any positions or titles you held and the dates of participation.

School	Organization	Positions Held	Dates
Stetson University College of Law	Student Government Association	Treasurer, Student Representative	2004 to 2005
	Business Law Society	Vice-President	2003 to 2005
	Phi Alpha Delta Fraternity	Member	2005
	Federalist Society	Member	2005
	Young Republicans	Member	2004 to 2005
	Christian Legal Society	Member	2003 to 2005
School	**Organization**	**Positions Held**	**Dates**
University of Florida	Master of Agri-Business Club	Vice-President	2000 to 2001
	Gamma Sigma Delta Agriculture Honor Fraternity	Member	2000 to 2001
	Accent Speakers Bureau	Member	1997 to 1999
	North Central Baptist Church	Active Member in the College / Career division, Choir and Praise Team	1996 to 2001

EMPLOYMENT:

9. List in reverse chronological order all full-time jobs or employment (including internships and clerkships) you have held since the age of 21. Include the name and address of the employer, job title(s) and dates of employment. For non-legal employment, please briefly describe the position and provide a business address and telephone number.

Employer	Job Title	Address	Dates
18th Judicial Circuit State Attorney's Office	**Assistant State Attorney** *Career Criminal / Firearm Unit *Economic Crimes and Elder Services Division Chief *Sex Crimes / Child Abuse Unit *Felony Line Attorney *Misdemeanor Attorney	2725 Judge Fran Jamieson Way, Building D Viera, FL 32940 (321) 617-7510	06/2006 to present
Eastern Florida State College	**Adjunct / Lecturer** (taught both Criminal Law and Criminal Procedure for a total 21 semesters)	1519 Clearlake Road Cocoa, FL 32922 (321) 433-5636	2009 to 2018
Jabil Circuit, Inc. (JBL) → Fortune #104 as of 2021	**Law Clerk, In House Counsel department**	10560 Dr. Martin Luther King, Jr. Street North St. Petersburg, FL 33716 (727) 577-9749	07/2004 to approx. 05/2006
State Attorney's Office – 6th Judicial Circuit	**Certified Legal Intern**	14250 49th St. North Clearwater, FL 33762 (727) 464-6221	01/2005 to 05/2005
Hillsborough County Aviation Authority (Tampa International Airport)	**Legal Intern**	4100 George J. Bean Parkway Tampa, FL 33607 (813) 676-4623	05/2004 to 07/2004
TempSource	**Receptionist at "WRUF" radio station – UF College of Journalism** (answered phones, kept prize spreadsheet and assisted main accountant)	4740 NW 39th Place, Suite A, Gainesville, FL 32606 (352) 378-2300	08/2002 to 12/2002
Vector Marketing (Independent consultant)	**Cutco salesperson / Assistant Branch Manager** (sold Cutco knives directly to consumers, managed and trained new salespersons)	1116 E State Street, Olean, NY 14760 (716) 373-6146	01/2002 to 08/2002

Employer	Job Title	Address	Dates
University of Florida College of Agriculture and Life Sciences Scholarship	**Intern for the Florida House of Representatives Committee on Agriculture** (assisted with Bill Analysis and preparation for committee meetings)	McCarty Hall D, Room 2020, Gainesville, FL, 32603 (352) 392-1826 and Florida House of Representatives 402 South Monroe St Tallahassee, FL 32399	09/2001 to 12/2001
TempSource	**Cashier at the University of Florida Dental School** (took payments from patients of dental students)	4740 NW 39th Place, Suite A, Gainesville, FL 32606 (352) 378-2300	06/2001 to 08/2001
United States Department of Agriculture	**Agriculture Marketing Specialist** (paid internship where I edited the National Directory of Farmers Markets, updated the USDA direct marketing web page, and assisted with two local Farmers Markets)	1400 Independence Avenue SW, Room 4509-S, Stop 0269, Washington, DC 20250 (202) 720-5024	05/2000 to 08/2000
University of Florida	**Teaching Assistant** (graded undergraduate papers & tests, held office hours to tutor students)	McCarty Hall D, Room 2020, Gainesville, FL, 32603 (352) 392-1826	01/2000 to 05/2001

10. Describe the general nature of your current practice including any certifications which you possess; additionally, if your practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice. Describe your typical clients or former clients and the problems for which they sought your services.

I am currently practicing law as an Assistant State Attorney in the Career Criminal and Firearms Unit. I am Board Certified in Criminal Trial Law. I prosecute repeat offenders who qualify for enhanced sentencing, such as Prison Releasee Reoffenders and Violent Career Criminals. I also prosecute defendants who commit crimes with firearms, including First Degree Murder. Previously, I was the Division Chief of the Economic Crimes and Elder Services Unit of the State Attorney's Office, prosecuting complex financial crimes, such as RICO and Aggravated White-Collar Crime, as well as crimes against our elderly, including homicide. Due to budget cuts related to the COVID-19 pandemic, that special unit was eliminated. While I was in that unit, I did vertical prosecution, meaning I had cases from the very beginning up through trial and sentencing. I worked hand-in-hand with the highly skilled Brevard County Sheriff's Office Economic Crimes Unit as their designated prosecutor, handling large-scale and high dollar fraud cases that frequently garner media attention. I have no typical client, although most of my cases involve a member of our community as a victim.

11. What percentage of your appearance in court in the last five years or in the last five years of practice (include the dates) was:

Court		Area of Practice	
Federal Appellate	_____ %	Civil	_____ %
Federal Trial	_____ %	Criminal	100 %
Federal Other	_____ %	Family	_____ %
State Appellate	1 %	Probate	_____ %
State Trial	99 %	Other	_____ %
State Administrative	_____ %		
State Other	_____ %		
TOTAL	100 %	TOTAL	100 %

If your appearance in court the last five years is substantially different from your prior practice, please provide a brief explanation: My appearance in court is not substantially different from my prior practice, although I am in court more often as a prosecutor within the Career Criminal and Firearm Unit.

12. In your lifetime, how many (number) of the cases that you tried to verdict, judgment, or final decision were:

Jury?	at least 79	Non-jury?	22
Arbitration?	_____	Administrative Bodies?	_____
Appellate?	_____		

13. Please list every case that you have argued (or substantially participated) in front of the United States Supreme Court, a United States Circuit Court, the Florida Supreme Court, or a Florida District Court of Appeal, providing the case name, jurisdiction, case number, date of argument, and the name(s), e-mail address(es), and telephone number(s) for opposing appellate counsel. If there is a published opinion, please also include that citation.

I have not argued or substantially participated in any appellate court listed.

14. Within the last ten years, have you ever been formally reprimanded, sanctioned, demoted, disciplined, placed on probation, suspended, or terminated by an employer or tribunal before which you have appeared? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No.

15. In the last ten years, have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any business or contractual arrangement? If so, please explain full.

No.

16. For your last six cases, which were tried to verdict or handled on appeal, either before a **jury**, judge, appellate panel, arbitration panel or any other administrative hearing officer, list the names, e-mail addresses, and telephone numbers of the trial/appellate counsel on all sides and court case numbers (include appellate cases). *This question is optional for sitting judges who have served five years or more.*

1. **State of Florida v. Brett McCoy,** case no. 052020CF046970AXXXXX
    a. Defense Counsel
        i. Raymond Hornstein (1st chair)
            1. 321-617-7373
            2. rhornstein@pd18.net
        ii. Colleen DeGraff (2nd chair)
            1. 321-617-7373
            2. cdegraff@pd18.net
    b. State Counsel
        i. Applicant (1st chair)
        ii. Sarah Beazley (2nd chair)
            1. 321-617-7510 (beginning 11/15/2021, contact 321-633-2090)
            2. sbeazley@sa18.org
    c. Appellate case no. 5D21-1060

2. **State of Florida v. Habibah Mills**, case no. 052019CF029281AXXXXX
    a. Defense Counsel
        i. Darrell Sedgwick
            1. 321-752-3115
            2. dsedgwick@rc5state.com
    b. State Counsel
        i. Applicant (1st chair)
        ii. Lindsey Boyle (2nd chair)
            1. 321-637-0067
            2. lboyle@lorislaw.com
    c. No appeal filed for conviction

3. **State of Florida v. Jonathan Prive**, case no. 052013CF067242AXXXXX
    a. Defense Counsel
        i. Pro Se (1st chair)
        ii. Marc Burnham (stand-by counsel)
            1. 407-926-2456
            2. Burnham.marc@gmail.com
    b. State Counsel
        i. Applicant (1st chair)
        ii. Kellen Simmons (2nd chair)
            1. 407-236-0564
            2. Kellen.simmons@allstate.com
    c. Appellate case no. 5D19-2058, 5D21-398

4. **State of Florida v. Umme Ferdousy**, case no. 052019CF014067AXXXXX
    a. Defense Counsel
        i. Tamara Meister (1st chair)
            1. 321-617-7373
            2. tmeister@pd18.net
    b. State Counsel
        i. Applicant (1st chair)
        ii. Guna Ose (2nd chair)
            1. 321-617-7510
            2. gose@sa18.org

5. **State of Florida v. Amanda Chandler**, case no. 052015CF037146AXXXXX
    a. Defense Counsel
        i. Jessica Hicks (1st chair)
            a. 321-617-7373
            b. jhicks@pd18.net
        ii. Jeremy Cleckner (2nd chair)
            a. 321-617-7373
            b. jcleckner@pd18.net
    b. State Counsel
        i. Applicant (1st chair)
        ii. Michael Doyle (2nd chair)
            a. 321-617-7510
            b. mdoyle@sa18.org
            c. No appeal filed for conviction

6. **State of Florida v. Joevonte Petit-Homme**, case no. 052016CF039485AXXXXX
    a. Defense Counsel
        i. Rebecca Morgan
            a. 321-272-0367
            b. Rebeccamorgan.esq@gmail.com
    b. State Counsel – Applicant
    c. Appellate case nos. 5D19-108, 5D20-940

17. For your last six cases, which were either settled in mediation or settled without mediation or trial, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases). *This question is optional for sitting judges who have served five years or more.*

1. **State of Florida v. Oliver Tower**, case no. 052020CF045070DXXXXX
    a. Defense Counsel
        i. Melissa Peat
            1. 321-775-3694
            2. melissa@coastallegalteam.com
    b. State Counsel
        i. Applicant

2. **State of Florida v. Jose Aguiar,** case no. 052019CF028034AXXXX
    a. Defense Counsel
        i. Daniel Martinez
            1. 321-419-8666
            2. daniel@martinez.law
    b. State Counsel
        i. Applicant (1st chair)
        ii. Bill Respess (2nd chair)
            1. 321-617-7510
            2. brespess@sa18.org
    c. NOTE: Sentencing is scheduled for January 7th, 2022.

3. **State of Florida v. Jonathan McCullough,** case no. 052019CF026888AXXXXX
    a. Defense Counsel
        i. Scott Bishop
            1. 321-752-3115
            2. sbishop@rc5state.com
    b. State Counsel
        i. Applicant

4. **State of Florida v. Aaron Greenfield**, case no. 052019CF039998AXXXXX
    a. Defense Counsel
        i. James Kontos
            1. 321-242-9777
            2. jim@kontoslawoffice.com
    b. State Counsel
        i. Applicant

5. **State of Florida v. Luis Moya Perdomo**, case no. 052020CF025271AXXXXX
    a. Defense Counsel
        i. Mark Lanning
            1. 321-617-7373
            2. mlanning@pd18.net
    b. State Counsel
        i. Applicant

6. **State of Florida v. Thomas Balk**, case no. 052021CF019024AXXXXX
    a. Defense Counsel
        i. Alan Diamond
            1. 321-953-0104
            2. alan@fsdcrimlaw.com
    b. State Counsel
        i. Applicant

18. During the last five years, on average, how many times per month have you appeared in Court or at administrative hearings? If during any period you have appeared in court with greater frequency than during the last five years, indicate the period during which you appeared with greater frequency and succinctly explain.

I have appeared in court (including remote appearances such as TEAMS), on average, fifteen (15) to twenty (20) times per month. There is hardly a day that goes by that I do not have at least one hearing in court. On the days I am not in court, I can likely be found in a deposition or witness interview.

19. If Questions 16, 17, and 18 do not apply to your practice, please list your last six major transactions or other legal matters that were resolved, listing the names, e-mail addresses, and telephone numbers of the other party counsel.

Questions 16, 17 and 18 do apply to my practice, see above.

20. During the last five years, if your practice was greater than 50% personal injury, workers' compensation or professional malpractice, what percentage of your work was in representation of plaintiffs or defendants?

Not applicable.

21. List and describe the five most significant cases which you personally litigated giving the case style, number, court and judge, the date of the case, the names, e-mail addresses, and telephone numbers of the other attorneys involved, and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant.

State of Florida v. Jonathan Prive	
Case No.	052013CF067242AXXXXX
Judge	Nancy Maloney (Brevard Circuit Court)
State Counsel	Applicant & Kellen Simmons 407-236-0564 Kellen.simmons@allstate.com
Defense Counsel	Pro Se Marc Burnham as standby counsel 407-926-2456 Burnham.marc@gmail.com
Trial dates	June 24, 2019 to July 1, 2019
5th DCA case No.	Prive v. State, 301 So.3d 440 (Fla. 5th DCA 2020)
I represented the State of Florida in this case. This case was significant to me as it was the last case in a series of cases involving a defendant who abused a child and posted ads on Craigslist to seek out additional abusers to abuse the child. Defendant Prive was one of multiple responders to an ad requesting strangers join the initial abuser in the horrendous acts. Prive had previously abused the child and was travelling back to abuse the child again when he was arrested. The Defendant was charged with Capital Sexual Battery, Lewd and Lascivious Molestation and Unlawful Travel to Meet a Minor. The case was six years old at the time of trial, due to a related Federal case and six defense attorney changes. During the course of this case, I dealt with issues related to service of out-of-state subpoenas and search warrants, recovery of digital forensic artifacts, and a defendant's decision to proceed *pro se* on the day of trial. I coordinated with officers of federal agencies to obtain their testimony after filing the appropriate *Touhy* letters, and coordinated with local jail officials over the course of many years to keep a testifying co-conspirator at the local jail instead of being transferred to federal custody. The trial had significant media exposure after the sentencing, and I found myself, for the first time, participating in a press conference with Sheriff Wayne Ivey. The defendant was found guilty as charged and sentenced to three consecutive LIFE sentences followed by 15 years DOC and labeled a Sexual Predator. See Tab 21 for the reported decision and a news article related to this case.	

State of Florida v. Joseph Pallante, III	
Case No.	052014CF015443AXXXXX
Judge	David Dugan (Brevard Circuit Court)
State Counsel	Applicant & Justin Keen 850-942-8430 Justin.keen@usdoj.gov
Defense Counsel	Greg Eisenmenger 321-504-0321 gregeisenmenger@ebplaw.com Scott Robinson 321-504-0321 scottrobinson@ebplaw.com
Trial dates	September 18, 2017 to October 10, 2017
5th DCA case No.	Pallante v. State, 278 So.3d 690 (Fla. 5th DCA 2019) → Per Curiam – Affirmed, unpublished disposition.

I represented the State of Florida in this case. This case was significant to me as it was my longest, most complex jury trial involving sexual crimes. The State presented to the jury approximately 55 counts consisting of Capital Sexual Battery, Lewd & Lascivious Molestation and Possession of Child Pornography, among other charges. For three years prior to trial, many significant legal issues were litigated while I was assigned to the case, including Child Victim Hearsay, a Motion to Sever the child pornography counts from the sexual contact offenses, a Motion to Dismiss the Information, a Motion for Statement of Particulars and *Williams* Rule evidence. The main defense counsel for the case was a very experienced Board Certified attorney in Criminal Trial Law, and constantly pursued every available legal avenue for the case. I also dealt with three (3) separate judges that were assigned to the case prior to trial. During the trial, the State was able to present to the jury a variety of evidence, including video evidence, a significant amount of digital forensic evidence and powerful witness testimony. After the trial, the defense filed several motions for new trial and motions regarding juror interviews. The trial itself lasted almost one (1) month. The jury returned a verdict finding the defendant guilty as charged to almost every charge. The defendant was sentenced to two consecutive LIFE sentences followed by an additional 30 years in prison followed by lifetime sex offender probation and was labeled a Sexual Predator. See Tab 21 for the unreported disposition and a news article related to this case.

State of Florida v. Umme Ferdousy	
Case No.	052019CF014067AXXXXX
Judge	Jack Griesbaum (Brevard Circuit Court)
State Counsel	Applicant & Guna Ose 321-617-7510 gose@sa18.org
Defense Counsel	Tamara Meister 321-617-7373 tmeister@pd18.net
Trial dates	June 18 - 20, 2019
5th DCA case No.	No case number, defendant found Not Guilty

I represented the State of Florida in this case. This case was significant to me as it provides a great example of how our justice system is designed to work together. The case facts alleged that the defendant (a female) committed Aggravated Battery and Aggravated Assault on her mother-in-law who resided with the family, with the mother-in-law complaining that the defendant was not allowing her and her husband access to food. The defendant, victim, and at least one witness only spoke Bengali, an uncommon language in Central Florida courts. Without access to in-person interpreters, jury trial preparation of the witnesses was exceedingly difficult given both the language and cultural barrier. For example, the victim kept saying she was cut on the hand, when the cut was obviously on her forearm. Once interpreters were obtained for trial, they were able to explain that in Bengali, the entire arm is often referenced as the "hand." The defendant desired a speedy trial, which would need interpreters, so the court, the Office of the Public Defender, the State Attorney's Office, and Court Administration all coordinated to allow interpreters from South Florida to be present. Additionally, competency concerns were raised on the day of trial, and again the court and counsel were able to arrange for a psychologist to evaluate the defendant with the assistance of the Bengali interpreter. An experienced Senior Judge was able to timely make rulings on issues involving *Williams* Rule evidence and propel the case forward within the few days that interpreters were available. Even though the jury found the defendant Not Guilty, this case was an example of how our justice system should work together, each individual playing a different role. This case solidified my desire to transition into the different role of judge. See Tab 21 for a news article related to this case.

State of Florida v. Miratel Capitaine	
Case No.	052017CF010078AXXXXX
Judge	Jeffrey Mahl (Brevard Circuit Court)
State Counsel	Applicant & Michael Doyle 321-617-7510 mdoyle@sa18.org
Defense Counsel	*Pro Se*
Trial dates	April 17 – 21, 2017
5th DCA case No., citation	5D17-2038 Capitaine v. State, 257 So.3d 460 (Fla. 5th DCA 2018) → Per Curiam – Affirmed (unpublished disposition), Capitaine v. State, 310 So.3d 1147 (Fla. 5th DCA 2021), 2021 WL 3184584 (Fla. 2021)
This case was significant to me because this was the first Human Trafficking jury trial and conviction in Brevard County, ever. The Defendant represented himself pro se, without standby counsel. This case involved the Defendant filing a Demand for Speedy Trial and finding difficult to reach victims, as is often the case with Human Trafficking victims. The State was able to present both victims to the jury, as well as forensic digital evidence from numerous cell phones, along with other testimony. This case was a textbook example of how the court should handle a *pro se* defendant, especially one who is misbehaving. I learned quite a bit from watching how the patient trial court reacted to and handled each of the issues that arose from the defendant, such as a malingering medical issue, juror accusations and numerous outbursts from the defendant. The Defendant was found guilty of numerous charges, including Human Trafficking, and sentenced as a Habitual Felony Offender to 18 years in prison followed by 17 years sex offender probation. See Tab 21 for the appellate court opinions and a news article related to this case.	

State of Florida v. George Fields	
Case No.	052010CF028919AXXX
Judge	Robert Wohn (Brevard Circuit Court)
State Counsel	Susan Stewart 321-617-7510 sstewart@sa18.org Applicant
Defense Counsel	Geoff Golub 321-757-6848 golublawfirm@gmail.com Erica Feinswog 321-241-6628 attorneyericafeinswog@gmail.com
Trial dates	January 13 – 21, 2014
5th DCA case No.	Fields v. State, 181 So.3d 505 (Fla. 5th DCA 2015) → Per Curiam – Affirmed (jury trial), unpublished disposition Fields v. State, 281 So.3d 573 (Fla. 5th DCA 2019) → Affirmed with Written Opinion (3.850 hearing)
This case was significant to me because this was the first time I tried a homicide case. The charge was First Degree Murder, however the death penalty was not sought. I joined the case approximately three (3) weeks prior to trial and handled approximately half of the trial as co-counsel, including opening statements. I had to quickly get up to speed in a case that had been pending several years, and I did. I also handled the Motion for 3.850 evidentiary hearing several years after the jury trial, which was denied after counsel for both sides filed written closing arguments. The original case involved a shooting in Palm Bay that the defendant claimed was self-defense. However, the jury rejected that defense and found the defendant guilty of Second Degree Murder. The defendant was sentenced to life in prison. See Tab 21 for the appellate opinions and a news article related to this case.	

22. Attach at least two, but no more than three, examples of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach a writing sample for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

State's Amended Motion for Pre-Trial Detention → July 2021 (State v. Gregory Barr)	I wrote 100% of the motion, minus any attachments. A copy of the order granting the State's Amended Motion is also attached.
State's Motion to Allow Live Video Testimony of Witnesses → January 2021 (State v. John Gray)	I wrote 75% of the motion, including all the portions related to the COVID-19 pandemic Florida Supreme Court orders and recent case law. A copy of the order granting the State's request is also attached.
State's Written Closing Argument Regarding Defendant's Motion to Suppress Evidence → August 2021 (State v. Da'rius Christian)	I wrote 100% of the closing argument. A copy of the order denying the Defendant's Motion to Suppress is also attached.

PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE

23. Have you ever held judicial office or been a candidate for judicial office? If so, state the court(s) involved, the dates of service or dates of candidacy, and any election results.

No.

24. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name(s) of the commission, the approximate date(s) of each submission, and indicate if your name was certified to the Governor's Office for consideration.

I previously submitted an application to this nominating commission on or about August 27th, 2018 to fill an open Circuit Court seat after Judge John Harris' elevation to the 5th DCA bench.

I previously submitted an application to this nominating commission on or about April 4th, 2019 to fill an open Circuit Court seat due to retirement of Judge Tonya Rainwater. **The local JNC certified my name to the Governor's Office for consideration.**

I previously submitted an application to this nominating commission on or about January 24th, 2020 to fill an open Circuit Court seat due to the retirement of Judge James Earp.

I previously submitted an application to this nominating commission on or about March 20th, 2020 to fill an open County Court seat due to the elevation of Judge Michelle Naberhaus.

25. List any prior quasi-judicial service, including the agency or entity, dates of service, position(s) held, and a brief description of the issues you heard.

None.

26. If you have prior judicial or quasi-judicial experience, please list the following information:

(i) the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance;
(ii) the approximate number and nature of the cases you handled during your tenure;
(iii) the citations of any published opinions; and
(iv) descriptions of the five most significant cases you have tried or heard, identifying the citation or style, attorneys involved, dates of the case, and the reason you believe these cases to be significant.

27. Provide citations and a brief summary of all of your orders or opinions where your decision was reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, attach copies of the opinions.

Not applicable.

28. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, attach copies of the opinions.

Not applicable.

29. Has a complaint about you ever been made to the Judicial Qualifications Commission? If so, give the date, describe the complaint, whether or not there was a finding of probable cause, whether or not you have appeared before the Commission, and its resolution.

Not applicable.

30. Have you ever held an attorney in contempt? If so, for each instance state the name of the attorney, case style for the matter in question, approximate date and describe the circumstances.

Not applicable.

31. Have you ever held or been a candidate for any other public office? If so, state the office, location, dates of service or candidacy, and any election results.

No, I have never held public office. I have never been a candidate for public office, other than my applications to become a judge as listed in Question 24.

NON-LEGAL BUSINESS INVOLVEMENT

32. If you are now an officer, director, or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment or election to judicial office.

Not applicable.

33. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, explain and provide dates. If you received any compensation of any kind outside the practice of law during this time, please list the amount of compensation received.

Since being admitted to the Bar, I have taught as an adjunct lecturer at Eastern Florida State College. I taught Criminal Law and Criminal Procedure on alternating semesters from 2009 to 2018, for a total of 21 semesters. My compensation was approximately $1,800 total per semester.

POSSIBLE BIAS OR PREJUDICE

34. The Commission is interested in knowing if there are certain types of cases, groups of entities, or extended relationships or associations which would limit the cases for which you could sit as the presiding judge. Please list all types or classifications of cases or litigants for which you, as a general proposition, believe it would be difficult for you to sit as the presiding judge. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

I would not be able to preside over cases where my husband or father-in-law were the counsel of record. However, my husband currently does not practice law as he . My father-in-law has few cases in Circuit Court, so I do not expect to be required to recuse myself from many cases.

PROFESSIONAL ACCOMPLISHMENTS AND OTHER ACTIVITIES

35. List the titles, publishers, and dates of any books, articles, reports, letters to the editor, editorial pieces, or other published materials you have written or edited, including materials published only on the Internet. Attach a copy of each listed or provide a URL at which a copy can be accessed.

I am currently writing a series of Quick Reference Guides to Criminal Law, although I have not yet attempted to have them published. I have attached a copy of my "2021 Quick Reference Guide to Frequent Sentencing Issues" for your review in Tab 35.

36. List any reports, memoranda or policy statements you prepared or contributed to the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. Provide the name of the entity, the date published, and a summary of the document. To the extent you have the document, please attach a copy or provide a URL at which a copy can be accessed.

I am currently a member of the Florida Bar Criminal Law Certification Committee. As a member of the committee, I assist in writing the examination for Criminal Trial Law Certification, including multiple choice questions and essays with model answers. Due to the confidential nature of the committee's work, I am not able to provide a copy to the JNC.

37. List any speeches or talks you have delivered, including commencement speeches, remarks, interviews, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place they were delivered, the sponsor of the presentation, and a summary of the presentation. If there are any readily available press reports, a transcript or recording, please attach a copy or provide a URL at which a copy can be accessed.

June 12, 2019 – Presentation at the American Legion on behalf of the Palm Bay SALT Council – **"*Elder Crimes*"** (I discussed crimes affecting the elderly, including common financial scams)

June 14, 2019 - **"*Coffee with Kathy*"** at the World Elder Abuse Awareness Day (a question-and-answer session regarding the State Attorney's Office's role in prosecuting Elder Crimes)

Guest Lecturer at FDLE Advanced Interviews & Interrogation Techniques Course – **"*How (not) to Lose a Confession in 10 Ways*"** (I give best practices for police detectives and case law updates concerning questioning of suspects – see Tab 37 for a printout of the most recent power point presentation I gave)

- September 11, 2019
- February 27, 2020
- October 28, 2020
- January 13, 2021
- July 28, 2021
- September 23, 2021
- October 20, 2021
-

Florida Institute of Technology guest lecturer for Critical Issues in Child Advocacy – **"*Prosecution of Child Abuse Cases*"** (A presentation with Victim Advocate Jennifer Mench highlighting the difficulties in prosecuting child abuse cases, especially sexual abuse cases involving children – see Tab 37 for a printout of the most recent power point presentation I gave)

- November 19, 2019
- November 17, 2020
-

38. Have you ever taught a course at an institution of higher education or a bar association? If so, provide the course title, a description of the course subject matter, the institution at which you taught, and the dates of teaching. If you have a syllabus for each course, please provide.

I previously taught both **Criminal Law** and **Criminal Procedure** at Eastern Florida State College from 2009 until 2018. When I taught Criminal Law and Criminal Procedure at Eastern Florida State College, I taught using a lecture format, frequently incorporating the latest changes in the law including areas such as search and seizure, criminal definitions, constitutional law, evidence and burdens of proof. See Tab 38 for a copy of representative syllabi from these two courses.

- **Criminal Law** → Fundamentals of Criminal Law, Separation of Powers, Enumerated Powers, Statutory Construction, *Gideon v. Wainwright*, Judicial Review, Bill of Rights Criminal Provisions, Elements of Crimes, Inchoate Offenses, Offenses Against the Person, Property Crimes, Offenses Against Public Morality, Drug and Alcohol offenses, Criminal Responsibility and Offenses
    - Spring 2009
    - Summer 2010
    - Fall 2010
    - Summer 2011
    - Fall 2011
    - Fall 2012
    - Fall 2013
    - Fall 2014
    - Fall 2015
    - Fall 2016
    - Fall 2018
- **Criminal Procedure** → Incorporation Doctrine and Due Process of Law, Jurisdiction of the Courts, 4th Amendment Search & Seizure, Reasonable Expectation of Privacy, Informants, Levels of Encounter, Stop & Frisk, Anonymous Tips, *Miranda*, Speedy Trial, Criminal Complaints, Right to Counsel, Adversarial Preliminary Hearings, Indictments, Identification Procedures, the Exclusionary Rule, Trial Preparation, Jury Trial Procedures, Sentencing, Appeals
    - Summer 2009
    - Spring 2010
    - Spring 2011
    - Spring 2012
    - Spring 2013
    - Spring 2014
    - Spring 2015
    - Spring 2016
    - Spring 2017
    - Spring 2018
    - NOTE: In this class, I had a fact pattern that was provided to the students in real-time involving DUI and Trafficking of a Controlled Substance. The students were given case information as it "happened," beginning with the

arrest and initial appearance. The end of the course culminated with a mock trial conducted by the students on the fact pattern. I presided as the judge over each mock trial.

39. List any fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement. Include the date received and the presenting entity or organization.

Legal honors

- Special recognition by the Brevard County Association of Chiefs of Police for State Attorney Trial Attorney of the Year – March 28, 2018
- State Attorney's Office Trial Attorney of the Year – December 2017
- State Attorney's Office Employee of the Month – February 2009, September 2016, April 2017, December 2018
- Inns of Court "Hammy" Award (awarded to the Inns of Court member who "hams it up" the most during group presentations – I played the role of a poorly prepped witness)

Academic Honors and Scholarships

- Saving the Earth's Environment through Knowledge (SEEK) Garden Club scholarship (chosen as a High School junior for a week-long program at the University of Florida)
- Bright Futures Scholarship, Academic Scholar (100% of tuition paid for undergraduate degree)
- Robert C. Byrd Leadership Scholarship (additional stipend over $1,000 each semester, above tuition during undergraduate degree)
- Teaching Assistantship (paid for ¾ of my tuition during my Master of Agri-Business program, as well as paying for 10 hours of work per week as a Teaching Assistant)
- Post-graduate scholarship from the University of Florida College of Agriculture and Life Sciences regarding a semester-long internship at the Florida State Capitol (Fall 2001).

Honor Society Memberships

- National Honor Society, Vice President (High School)
- Gamma Sigma Delta Agricultural Honor Society (University of Florida)

Other Awards

- Girl Scouts Silver Award (presented at the Florida Capitol, 2nd highest achievement in Girl Scouts)
- Hugh O'Brien Youth Leadership Seminar (as High School sophomore, only 1 student is chosen per school to attend)
- Lake County Student School Board member (as High School Senior / Student Body President, chosen as representative to attend School Board meetings and functions)
- Lake County Commissioner for a Day (chosen to participate in mock County Commission meeting with County Commissioners as mentors)
- President's Award Stetson University College of Law (for service as Student Government Treasurer for 1.5 years)

40. Do you have a Martindale-Hubbell rating? If so, what is it and when was it earned?

No.

41. List all bar associations, legal, and judicial-related committees of which you are or have been a member. For each, please provide dates of membership or participation. Also, for each indicate any office you have held and the dates of office.

- Criminal Law Board Certification Committee, member 2020 to 2023
- Brevard County Bar Association, member, various years from 2006 to 2021
- Brevard County Association of Women Lawyers, member, various years – most recently 2020 to 2021
- Vassar B. Carlton Inns of Court, former member (pupil) 2007 to 2010 approximately
- Federalist Society, member since 2004 (as law student, more recently as attorney member)

42. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in the previous question to which you belong, or to which you have belonged since graduating law school. For each, please provide dates of membership or participation and indicate any office you have held and the dates of office.

- Secret Service Cyber Fraud Task Force, member since 2018
- Brevard TRIAD for Seniors (Brevard County Sheriff's Office, Law Enforcement, State Attorney's Office), board member, member since 2019
- Community Services League of Brevard, member since 2019
- SALT Council (Seniors and Law Enforcement Together), member since 2019
- First Baptist Church of Merritt Island, former member from 2007 until 2016
- Church at Viera, attendee since 2016

43. Do you now or have you ever belonged to a club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion (other than a church, synagogue, mosque or other religious institution), national origin, or sex (other than an educational institution, fraternity or sorority)? If so, state the name and nature of the club(s) or organization(s), relevant policies and practices and whether you intend to continue as a member if you are selected to serve on the bench.

From elementary school through high school, I was a member of the Girl Scouts. At the time of my membership, Girl Scouts of the United States of America restricted membership on the basis of sex. I am no longer a member and would not be a member if selected to serve on the bench, mostly because I do not have any daughters.

44. Please describe any significant pro bono legal work you have done in the past 10 years, giving dates of service.

None. As a full-time government attorney, I am prohibited from doing any pro bono legal work.

45. Please describe any hobbies or other vocational interests.

My hobbies include traveling, watching movies, and spending time with my family.

46. Please state whether you have served or currently serve in the military, including your dates of service, branch, highest rank, and type of discharge.

I have never served in the military.

47. Please provide links to all social media and blog accounts you currently maintain, including, but not limited to, Facebook, Twitter, LinkedIn, and Instagram.

FAMILY BACKGROUND

48. Please state your current marital status. If you are currently married, please list your spouse's name, current occupation, including employer, and the date of the marriage. If you have ever been divorced, please state for each former spouse their name, current address, current telephone number, the date and place of the divorce and court and case number information.

I am currently married to . He is an attorney
We were married on March 8, 2008.

I have never been divorced.

49. If you have children, please list their names and ages. If your children are over 18 years of age, please list their current occupation, residential address, and a current telephone number.

CRIMINAL AND MISCELLANEOUS ACTIONS

50. Have you ever been convicted of a felony or misdemeanor, including adjudications of guilt withheld? If so, please list and provide the charges, case style, date of conviction, and terms of any sentence imposed, including whether you have completed those terms.

No.

51. Have you ever pled nolo contendere or guilty to a crime which is a felony or misdemeanor, including adjudications of guilt withheld? If so, please list and provide the charges, case style, date of conviction, and terms of any sentence imposed, including whether you have completed those terms.

No.

52. Have you ever been arrested, regardless of whether charges were filed? If so, please list and provide sufficient details surrounding the arrest, the approximate date and jurisdiction.

No.

53. Have you ever been a party to a lawsuit, either as the plaintiff, defendant, petitioner, or respondent? If so, please supply the case style, jurisdiction/county in which the lawsuit was filed, case number, your status in the case, and describe the nature and disposition of the matter.

No.

54. To your knowledge, has there ever been a complaint made or filed alleging malpractice as a result of action or inaction on your part?

No.

55. To the extent you are aware, have you or your professional liability carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the name of the client(s), approximate dates, nature of the claims, the disposition and any amounts involved.

No.

56. Has there ever been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. If so, provide the particulars of each finding or investigation.

No.

57. To your knowledge, within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers, clients, or the like, ever filed a formal complaint or accusation of misconduct including, but not limited to, any allegations involving sexual harassment, creating a hostile work environment or conditions, or discriminatory behavior against you with any regulatory or investigatory agency or with your employer? If so, please state the date of complaint or accusation, specifics surrounding the complaint or accusation, and the resolution or disposition.

No.

58. Are you currently the subject of an investigation which could result in civil, administrative, or criminal action against you? If yes, please state the nature of the investigation, the agency conducting the investigation, and the expected completion date of the investigation.

No.

59. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you, this includes any corporation or business entity that you were involved with? If so, please provide the case style, case number, approximate date of disposition, and any relevant details surrounding the bankruptcy.

No.

60. In the past ten years, have you been subject to or threatened with eviction proceedings? If yes, please explain.

No.

61. Please explain whether you have complied with all legally required tax return filings. To the extent you have ever had to pay a tax penalty or a tax lien was filed against you, please explain giving the date, the amounts, disposition, and current status.

I have complied with all legally required tax return filings.

HEALTH

62. Are you currently addicted to or dependent upon the use of narcotics, drugs, or alcohol?

No.

63. During the last ten years have you been hospitalized or have you consulted a professional or have you received treatment or a diagnosis from a professional for any of the following: Kleptomania, Pathological or Compulsive Gambling, Pedophilia, Exhibitionism or Voyeurism? If your answer is yes, please direct each such professional, hospital and other facility to furnish the Chairperson of the Commission any information the Commission may request with respect to any such hospitalization, consultation, treatment or diagnosis. ["Professional" includes a Physician, Psychiatrist, Psychologist, Psychotherapist or Mental Health Counselor.] Please describe such treatment or diagnosis.

No.

64. In the past ten years have any of the following occurred to you which would interfere with your ability to work in a competent and professional manner: experiencing periods of no sleep for two or three nights, experiencing periods of hyperactivity, spending money profusely with extremely poor judgment, suffering from extreme loss of appetite, issuing checks without sufficient funds, defaulting on a loan, experiencing frequent mood swings, uncontrollable tiredness, falling asleep without warning in the middle of an activity. If yes, please explain.

No.

65. Do you currently have a physical or mental impairment which in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner? If yes please explain the limitation or impairment and any treatment, program or counseling sought or prescribed.

No.

66. During the last ten years, have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservatorship or committee? If yes, provide full details as to court, date, and circumstances.

No.

67. During the last ten years, have you unlawfully used controlled substances, narcotic drugs, or dangerous drugs as defined by Federal or State laws? If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal or State law provisions.)

No.

68. In the past ten years, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned, or terminated by an employer as result of your alleged consumption of alcohol, prescription drugs, or illegal drugs? If so, please state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action

No.

69. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? If so, please state the date you were requested to submit to such a test, the type of test required, the name of the entity requesting that you submit to the test, the outcome of your refusal, and the reason why you refused to submit to such a test.

No.

70. In the past ten years, have you suffered memory loss or impaired judgment for any reason? If so, please explain in full.

No.

SUPPLEMENTAL INFORMATION

71. Describe any additional education or experiences you have which could assist you in holding judicial office.

As an Assistant State Attorney I have tried at least 79 criminal jury trials to verdict, including two (2) jury trials during the course of the COVID-19 pandemic. As I have continually expressed my desire to become a Circuit Court judge, I shadowed a Circuit Civil Judge in Osceola County during the beginning of the pandemic to see how civil dockets were being handled by using TEAMS, in preparation for my own use of TEAMS in evidentiary hearings. While finishing my law degree & MBA, I clerked for two years with the Legal Department of Jabil Circuit, a Fortune 500 company (now Fortune #104). While at Jabil, I kept track of contract language during a period of rapid mergers and acquisitions, and assisted in-house counsel as work projects came in, specifically dealing with a records retentions policy post-Sarbanes Oxley, as well as international considerations with RoHs / Weee compliance. My education and clerking experience will assist me in civil cases by providing a broad-based background from which to pull knowledge.

Even though my post-law school experience has solely been as a criminal prosecutor, many of my criminal cases have overlapped with civil cases. Since most Circuit Court judges routinely switch between criminal and civil dockets, my prior experiences should make for a seamless transition to the bench.

If asked to fill the role of acting Circuit Court judge, my experience in general felony cases regularly dealt with domestic violence civil injunctions, causing me to review not only the hearings themselves, but the history of the case. One felony case, in particular, dealt with the charge of Burglary of a Dwelling between a divorced couple involving the marital residence. To find justice for the case, I needed to review all the documents in the contested family law case, including the partial mediated settlement agreement and a transcript of the trial. After a full review and speaking with the civil lawyers involved, I dropped the criminal case.

In the specialty units I have worked, I have also frequently dealt with the civil side of the case. While in the sex crimes and child abuse unit, many cases were running parallel with a dependency proceeding and evidence would be shared for termination of parental rights hearings. I was in frequent contact with both DCF attorneys and DCF investigators who would be called to testify at the dependency proceedings, as well as in criminal court for bond hearings or jury trials. When I was in the Economic Crimes and Elder Services Unit, the criminal prosecutions were quasi-civil in nature, at times, and often involved voluminous financial business records, numbering in the hundreds of thousands of pages. Exploitation of the Elderly cases frequently involve the statutes surrounding Powers of Attorney and Guardianships. Much like child abuse cases, they also involved DCF with Adult Protective Services. I also inherited a large drug RICO (Racketeering) wiretap case, which resulted in significant litigation regarding public record exemptions, culminating in the writing of my first appellate petition to the 5th District Court of Appeal. The Petition for Writ of Certiorari was voluntarily dismissed after I prevailed at a rehearing at the trial level. I am currently prosecuting two different drug-related RICO cases, as well as a public corruption RICO case.

As a trial attorney, when I try cases or litigate motions, I always keep in mind any potential appellate issues that may arise down the road. Please see Tab 71 for two (2) appellate opinions where I was the attorney at the trial level, including an issue of first impression (Phillips).

72. Explain the particular contribution you believe your selection would bring to this position and provide any additional information you feel would be helpful to the Commission and Governor in evaluating your application.

I have a particular knack for mastering an area of law in a short amount of time, whether it be a factual scenario (such as a new criminal case), or an entirely new area of the law. I have a firm understanding of the evidence code and the proper procedures to be followed pre-trial, during trial and post-trial. I am known for my ability to quickly research case law, frequently being asked the current state of the law by both prosecutors and defense attorneys. From the very beginning of my career, I have developed helpful quick reference guides in each area I have practiced – DUI trial issues, general felony issues, Career Criminal, and a Sex Crimes Handbook for Prosecutors – to pass on what I have learned to other attorneys. I hope to continue to be a resource when I am on the bench.

REFERENCES

73. List the names, addresses, e-mail addresses and telephone numbers of ten persons who are in a position to comment on your qualifications for a judicial position and of whom inquiry may be made by the Commission and the Governor.

Name & Email address	Address	Telephone Number
Phil Archer, State Attorney parcher@sa18.org	2725 Judge Fran Jamieson Way Building D Viera, FL 32940	321-617-7510
Michael Pirolo, Chief Assistant Public Defender mpirolo@sa18.org	2725 Judge Fran Jamieson Way Building E Viera, FL 32940	321-617-7373
Tyler Sirois, State Representative, District 51 tsirois@sa18.org	1301 The Capitol 402 South Monroe Street Tallahassee, FL 32399-1300	850-717-5051 or 321-617-7510
Jason Arthur, Chief Deputy Clerk of the Circuit Court for Brevard County Jason.Arthur@brevardclerk.us	2825 Judge Fran Jamieson Way Viera, FL 32940	321-637-5413
Hon. Samuel Bookhardt Circuit Judge Christa.conklin@flcourts18.org	2825 Judge Fran Jamieson Way Viera, FL 32940	321-617-7289
Hon. David Koenig, Acting Circuit Judge David.koenig@flcourts18.org	2825 Judge Fran Jamieson Way Viera, FL 32940	321-617-7262
Hon. Thomas Brown, County Court Judge Thomas.brown@flcourts18.org	2825 Judge Fran Jamieson Way Viera, FL 32940	321-617-7285
Hon. Aaron Peacock, County Court Judge Aaron.peacock@flcourts18.org	2825 Judge Fran Jamieson Way Viera, FL 32940	321-637-7236
Darrell Sedgwick, Office of Regional Counsel dsedgwick@rc5state.com	7165 Murrell Rd, Suite 101 Melbourne, FL 32940	321-752-3115
Pamela Koller, Assistant Attorney General, Former chair of the Criminal Law Board Certification Committee Pamela.Koller@myfloridalegal.com	444 Seabreeze Blvd Fl 5 Daytona Beach, FL 32118	386-238-4990

CERTIFICATE

I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(l), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

Further, I stipulate I have read, and understand the requirements of the Florida Code of Judicial Conduct.

Dated this 5th day of November, 2021.

KATHRYN M. SPEICHER
Printed Name

Kathryn M. Speicher
Signature

(Pursuant to Section 119.071(4)(d)(1), F.S.), . . . *The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from the provisions of subsection (1), dealing with public records.*

FINANCIAL HISTORY

1. State the amount of gross income you have earned, or losses you have incurred (before deducting expenses and taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

   Current Year-To-Date: __$57,938.50_____

   Last Three Years: __$75,562.50__ __$72,739.13_ ___$65,833.32_____

2. State the amount of net income you have earned, or losses you have incurred (after deducting expenses but not taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

   Current Year-To-Date: __$57,938.50_____

   Last Three Years: ___$75,562.50__ __$72,739.13_ ___$65,833.32_____

3. State the gross amount of income or loses incurred (before deducting expenses or taxes) you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

   Current Year-To-Date: ____$0_____

   Last Three Years: _____$0___ _____$0____ ___$3,616.15 (EFSC – 2018)

4. State the amount you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

   Current Year-To-Date: ___$0_____

   Last Three Years: _____$0_____ ____$0_____ __$3,616.15 (EFSC – 2018)

5. State the amount of net income you have earned or losses incurred (after deducting expenses) from all sources other than the practice of law for the preceding three-year period on a year by year basis, and generally describe the sources of such income or losses.

   Current Year-To-Date: ___$0_____

   Last Three Years: _____$0_____ _____$0____ ___$3,616.15 (EFSC – 2018)

FORM 6
FULL AND PUBLIC

DISCLOSURE OF FINANCIAL INTEREST

PART A – NET WORTH

Please enter the value of your net worth as of December 31 or a more current date. [Note: Net worth is not calculated by subtracting your *reported* liabilities from your *reported* assets, so please see the instructions on page 3.]

My net worth as of Nov. 5th, 2021 was $ 167,266 .

PART B - ASSETS

HOUSEHOLD GOODS AND PERSONAL EFFECTS:

Household goods and personal effects may be reported in a lump sum if their aggregate value exceeds $1,000. This category includes any of the following, if not held for investment purposes; jewelry; collections of stamps, guns, and numismatic items; art objects; household equipment and furnishings; clothing; other household items; and vehicles for personal use.

The aggregate value of my household goods and personal effects (described above) is $ 20,000

ASSETS INDIVIDUALLY VALUED AT OVER $1,000:

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)	VALUE OF ASSET
2008 Honda CR-V	$6,954
Florida Prepaid College Plans (2)	$41,184.24
Florida Retirement Services – Investment Plan	$150,643.72
House at	$310,000.00
Bank Accounts	$13,215.96

PART C - LIABILITIES

LIABILITIES IN EXCESS OF $1,000 (See instructions on page 4): NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
House Mortgage, PennyMac, 3043 Townsgate Rd, Suite 200, West Lake Village, CA 91361	$170,995.04
Nelnet Student Loan, P.O. Box 82561, Lincoln, NE 68501-2561	$69,735.20
Navient Student Loan, P.O. Box 9533, Wilkes-Barre, PA 18773-9533	$72,412.99
Space Coast Credit Union, 8045 N. Wickham Rd, Melbourne, FL 32940	$51,588.66

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE: NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
None	

PART D - INCOME

You may ***EITHER*** (1) file a complete copy of your latest federal income tax return, *including all W2's, schedules, and attachments,* ***OR*** (2) file a sworn statement identifying each separate source and amount of income which exceeds $1,000 including secondary sources of income, by completing the remainder of Part D, below.

☐ I elect to file a copy of my latest federal income tax return and all W2's, schedules, and attachments.
(if you check this box and attach a copy of your latest tax return, you need *not* complete the remainder of Part D.]

PRIMARY SOURCE OF INCOME (See instructions on page 5):

NAME OF SOURCE OF INCOME EXCEEDING $1,000	ADDRESS OF SOURCE OF INCOME	AMOUNT
State Attorney's Office	2725 Judge Fran Jamieson Way, Bldg D, Viera, Fl 32940	$77,000

SECONDARY SOURCES OF INCOME [Major customers, clients, etc., of businesses owned by reporting person—see instructions on page 6]

NAME OF BUSINESS ENTITY	NAME OF MAJOR SOURCES OF BUSINESS' INCOME	ADDRESS OF SOURCE	PRINCIPAL BUSINESS ACTIVITY OF SOURCE
None			

PART E – INTERESTS IN SPECIFIC BUSINESS [Instructions on page 7]

	BUSINESS ENTITY #1	BUSINESS ENTITY #2	BUSINESS ENTITY #3
NAME OF BUSINESS ENTTITY			
ADDRESS OF BUSINESS ENTITY			
PRINCIPAL BUSINESS ACTIVITY			
POSITION HELD WITH ENTITY			
I OWN MORE THAN A 5% INTEREST IN THE BUSINESS			
NATURE OF MY OWNERSHIP INTEREST			

IF ANY OF PARTS A THROUGH E ARE CONTINUED ON A SEPARATE SHEET, PLEASE CHECK HERE ☐

OATH

I, the person whose name appears at the beginning of this form, do depose on oath or affirmation and say that the information disclosed on this form and any attachments hereto is true, accurate, and complete.

Matt M. Spirk

SIGNATURE

STATE OF FLORIDA

COUNTY OF Brevard

Sworn to (or affirmed) and subscribed before me this 5th day of November, 20 21 by _____

Lisa Baumhover

(Signature of Notary Public—State of Florida)

LISA BAUMHOVER
MY COMMISSION # HH 050901
EXPIRES: October 6, 2024
Bonded Thru Notary Public Underwriters

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known ✓ *OR* Produced Identification _____

Type of Identification Produced _____

INSTRUCTIONS FOR COMPLETING FORM 6:

PUBLIC RECORD: The disclosure form and everything attached to it is a public record. **Your Social Security Number is not required and you should redact it from any documents you file** If you are an active or former officer or employee listed in Section 119.071(4)(d), F.S., whose home address is exempt from disclosure, the Commission is required to maintain the confidentiality of your home address ***if you submit a written request for confidentiality.***

PART A – NET WORTH

Report your net worth as of December 31 or a more current date, and list that date. This should be the same date used to value your assets and liabilities. In order to determine your net worth, you will need to total the value of all your assets and subtract the amount of all of your liabilities. Simply subtracting the liabilities reported in Part C from the assets reported in Part B will not result in an accurate net worth figure in most cases.

To total the value of your assets, add:

(1) The aggregate value of household goods and personal effects, as reported in Part B of this form;

(2) The value of all assets worth over $1,000, as reported in Part B; and

(3) The total value of any assets worth less than $1,000 that were not reported or included in the category of "household goods and personal effects."

To total the amount of your liabilities, add:

(1) The total amount of each liability you reported in Part C of this form, except for any amounts listed in the "joint and several liabilities not reported above" portion; and,

(2) The total amount of unreported liabilities (including those under $1,000, credit card and retail installment accounts, and taxes owed).

PART B – ASSETS WORTH MORE THAN $1,000

HOUSEHOLD GOODS AND PERSONAL EFFECTS:

The value of your household goods and personal effects may be aggregated and reported as a lump sum, if their aggregate value exceeds $1,000. The types of assets that can be reported in this manner are described on the form.

ASSETS INDIVIDUALLY VALUED AT MORE THAN $1,000:

Provide a description of each asset you had on the reporting date chosen for your net worth (Part A), that was worth more than $1,000 and that is not included as household goods and personal effects, and list its value. Assets include: interests in real property; tangible and intangible personal property, such as cash, stocks, bonds, certificates of deposit, interests in partnerships, beneficial interest in a trust, promissory notes owed to you, accounts received by you, bank accounts, assets held in IRAs, Deferred Retirement Option Accounts, and Florida Prepaid College Plan accounts. You are not required to disclose assets owned solely by your spouse.

How to Identify or Describe the Asset:

— Real property: Identify by providing the street address of the property. If the property has no street address, identify by describing the property's location in a manner sufficient to enable a member of the public to ascertain its location without resorting to any other source of information.

— Intangible property: Identify the type of property and the business entity or person to which or to whom it relates. **Do not list simply "stocks and bonds" or "bank accounts "** For example, list "Stock (Williams Construction Co.)," "Bonds (Southern Water and Gas)," "Bank accounts(First

National Bank)," "Smith family trust," Promissory note and mortgage (owed by John and Jane Doe)."

How to Value Assets:

— Value each asset by its fair market value on the date used in Part A for your net worth.

— Jointly held assets: If you hold real or personal property jointly with another person, your interest equals your legal percentage of ownership in the property. However, assets that are held as tenants by the entirety or jointly with right of survivorship must be reported at 100% of their value.

— Partnerships: You are deemed to own an interest in a partnership which corresponds to your interest in the equity of that partnership.

— Trusts: You are deemed to own an interest in a trust which corresponds to your percentage interest in the trust corpus.

— Real property may be valued at its market value for tax purposes, unless a more accurate appraisal of its fair market value is available.

— Marketable securities which are widely traded and whose prices are generally available should be valued based upon the closing price on the valuation date.

— Accounts, notes, and loans receivable: Value at fair market value, which generally is the amount you reasonably expect to collect.

— Closely-held businesses: Use any method of valuation which in your judgment most closely approximates fair market value, such as book value, reproduction value, liquidation value, capitalized earnings value, capitalized cash flow value, or value established by "buy-out" agreements. It is suggested that the method of valuation chosen be indicated in a footnote on the form.

— Life insurance: Use cash surrender value less loans against the policy, plus accumulated dividends.

PART C—LIABILITIES

LIABILITIES IN EXCESS OF $1,000:

List the name and address of each creditor to whom you were indebted on the reporting date chosen for your net worth (Part A) in an amount that exceeded $1,000 and list the amount of the liability. Liabilities include: accounts payable; notes payable; interest payable; debts or obligations to governmental entities other than taxes (except when the taxes have been reduced to a judgment); and judgments against you. You are not required to disclose liabilities owned *solely* by your spouse.

You do not have to list on the form any of the following: credit card and retail installment accounts, taxes owed unless the taxes have been reduced to a judgment), indebtedness on a life insurance policy owned to the company of issuance, or contingent liabilities. A "contingent liability" is one that will become an actual liability only when one or more future events occur or fail to occur, such as where you are liable only as a partner (without personal liability) for partnership debts, or where you are liable only as a guarantor, surety, or endorser on a promissory note. If you are a "co-maker" on a note and have signed as being jointly liable or jointly and severally liable, then this is not a contingent liability.

How to Determine the Amount of a Liability:

— Generally, the amount of the liability is the face amount of the debt.

— If you are the only person obligated to satisfy a liability, 100% of the liability should be listed.

— If you are jointly and severally liable with another person or entity, which often is the case where more than one person is liable on a promissory note, you should report here only the portion of the liability that corresponds to your percentage of liability. *However*, if you are jointly and severally liable for a debt relating to property you own with one or more others as tenants by the entirely or jointly, with right of survivorship,

report 100% of the total amount owed.

— If you are only jointly (not jointly and severally) liable with another person or entity, your share of the liability should be determined in the same way as you determined your share of jointly held assets.

Examples:

— You owe $10,000 to a bank for student loans, $5,000 for credit card debts, and $60,000 with your spouse to a saving and loan for the mortgage on the home you own with your spouse. You must report the name and address of the bank ($10,000 being the amount of that liability) and the name and address of the savings and loan ($60,000 being the amount of this liability). The credit cards debts need not be reported.

— You and your 50% business partner have a $100,000 business loan from a bank and you both are jointly and severally liable. Report the name and address of the bank and $50,000 as the amount of the liability. If your liability for the loan is only as a partner, without personal liability, then the loan would be a contingent liability.

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:

List in this part of the form the amount of each debt, for which you were jointly and severally liable, that is not reported in the "Liabilities in Excess of $1,000" part of the form. Example: You and your 50% business partner have a $100,000 business loan from a bank and you both are jointly and severally liable. Report the name and address of the bank and $50,000 as the amount of the liability, as you reported the other 50% of the debt earlier.

PART D – INCOME

As noted on the form, you have the option of either filing a copy of your latest federal income tax return, including all schedules, W2's and attachments, with Form 6, or completing Part D of the form. If you do not attach your tax return, you must complete Part D.

PRIMARY SOURCES OF INCOME:

List the name of each source of income that provided you with more than $1,000 of income during the year, the address of that source, and the amount of income received from that source. The income of your spouse need not be disclosed; however, if there is a joint income to you and your spouse from property you own jointly (such as interest or dividends from a bank account or stocks), you should include all of that income.

"Income" means the same as "gross income" for federal income tax purposes, even if the income is not actually taxable, such as interest on tax-free bonds. Examples of income include: compensation for services, gross income from business, gains from property dealings, interest, rents, dividends, pensions, IRA distributions, distributive share of partnership gross income, and alimony, but not child support. Where income is derived from a business activity you should report that income to you, as calculated for income tax purposes, rather than the income to the business.

Examples:

— If you owned stock in and were employed by a corporation and received more than $1,000 of income (salary, commissions, dividends, etc.) from the company, you should list the name of the company, its address, and the total amount of income received from it.

— If you were a partner in a law firm and your distributive share of partnership gross income exceeded $1,000, you should list the name of the firm, its address, and the amount of your distributive share.

— If you received dividend or interest income from investments in stocks and bonds, list only each individual company from which you received more than $1,000. Do not aggregate income from all of these investments.

— If more than $1,000 of income was gained from the sale of property, then you should list as a source of income the name of the purchaser, the purchaser's address, and the amount of gain from the sale. If the purchaser's

identity is unknown, such as where securities listed on an exchange are sold through a brokerage firm, the source of income should be listed simply as "sale of (name of company) stock," for example.

— If more than $1,000 of your income was in the form of interest from one particular financial institution (aggregating interest from all CD's, accounts, etc., at that institution), list the name of the institution, its address, and the amount of income from that institution.

SECONDARY SOURCE OF INCOME:

This part is intended to require the disclosure of major customers, clients, and other sources of income to businesses in which you own an interest. It is not for reporting income from second jobs. That kind of income should be reported as a "Primary Source of Income." You will ***not*** have anything to report ***unless***:

(1) You owned (either directly or indirectly in the form of an equitable or beneficial interest) during the disclosure period, more than 5% of the total assets or capital stock of a business entity (a corporation, partnership, limited partnership, LLC, proprietorship, joint venture, trust, firm, etc., doing business in Florida); and

(2) You received more than $1,000 in gross income from that business entity during the period.

If your ownership and gross income exceeded the two thresholds listed above, then for that business entity you must list every source of income to the business entity which exceeded 10% of the business entity's gross income (computed on the basis of the business entity's more recently completed fiscal year), the source's address, the source's principal business activity, and the name of the business entity in which you owned an interest. You do not have to list the amount of income the business derived from that major source of income.

Examples:

— You are the sole proprietor of a dry cleaning business, from which you received more than $1,000 in gross income last year. If only one customer, a uniform rental company, provided more than 10% of your dry cleaning business, you must list the name of your business, the name of the uniform rental company, its address, and its principal business activity (uniform rentals).

— You are a 20% partner in a partnership that owns a shopping mall and your gross partnership income exceeded $1,000. You should list the name of the partnership, the name of each tenant of the mall that provided more than 10% of the partnership's gross income, the tenant's address and principal business activity.

PART E – INTERESTS IN SPECIFIED BUSINESS

The types of businesses covered in this section include: state and federally chartered banks; state and federal savings and loan associations; cemetery companies; insurance companies; mortgage companies, credit unions; small loan companies; alcoholic beverage licensees; pari-mutuel wagering companies; utility companies; and entities controlled by the Public Service Commission; and entities granted a franchise to operate by either a city or a county government.

You are required to make this disclosure if you own or owned (either directly or indirectly in the form of an equitable or beneficial interest) at any time during the disclosure period, more than 5% of the total assets or capital stock of one of the types of business entities listed above. You also must complete this part of the form for each of these types of business for which you are, or were at any time during the year an officer, director, partner, proprietor, or agent (other than a resident agent solely for service of process).

If you have or held such a position or ownership interest in one of these types of businesses, list: the name of the business, its address and principal business activity, and the position held with the business (if any). Also, if you own(ed) more than a 5% interest in the business, as described above, you must indicate that fact and describe the nature of your interest.

JUDICIAL APPLICATION DATA RECORD

The judicial application shall include a separate page asking applicants to identify their race, ethnicity and gender. Completion of this page shall be optional, and the page shall include an explanation that the information is requested for data collection purposes in order to assess and promote diversity in the judiciary. The chair of the Commission shall forward all such completed pages, along with the names of the nominees to the JNC Coordinator in the Governor's Office (pursuant to JNC Uniform Rule of Procedure).

(Please Type or Print)

Date: 11-5-2021

JNC Submitting To: 18th Judicial Circuit

Name (please print): Kathryn M. Speicher

Current Occupation: Attorney

Telephone Number: 321-617-7510 Attorney No.: 0021855

Gender (check one): ☐ Male ☒ Female

Ethnic Origin (check one):
- ☒ White, non-Hispanic
- ☐ Hispanic
- ☐ Black
- ☐ American Indian/Alaskan Native
- ☐ Asian/Pacific Islander

County of Residence: Brevard

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

DISCLOSURE PURSUANT TO THE
FAIR CREDIT REPORTING ACT (FCRA)

The Florida Department of Law Enforcement (FDLE) may obtain one or more consumer reports, including but not limited to credit reports, about you, for employment purposes as defined by the Fair Credit Reporting Act, including for determinations related to initial employment, reassignment, promotion, or other employment-related actions.

CONSUMER'S AUTHORIZATION FOR
FDLE TO OBTAIN CONSUMER REPORT(S)

I have read and understand the above Disclosure. I authorize the Florida Department of Law Enforcement (FDLE) to obtain one or more consumer reports on me, for employment purposes, as described in the above Disclosure.

Kathryn M. Speicher
Printed Name of Applicant

Kat M. Speich
Signature of Applicant

Date: 11-5-2021

TAB 21

Significant cases – appellate decision and news articles

301 So.3d 440 (Mem)
District Court of Appeal of Florida, Fifth District.

Jonathan PRIVE, Appellant,
v.
STATE of Florida, Appellee.

Case No. 5D19-2058
|
Opinion filed May 15, 2020
|
Rehearing Denied July 9, 2020

Appeal from the Circuit Court for Brevard County, Nancy Maloney, Judge.

Attorneys and Law Firms

Jonathan Prive, Graceville, pro se.

James S. Purdy, Public Defender, and Allison A. Havens, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and L. Charlene Matthews, Assistant Attorney General, Daytona Beach, for Appellee.

Opinion

PER CURIAM.

In this *Anders*[1] appeal, we affirm Jonathan Prive's judgment and sentence. However, we remand for the trial court to strike certain costs it imposed as follows.

First, the costs order errantly included the $100 costs of prosecution twice: once citing ***441** section 938.27(8), Florida Statutes (2019), identified as "Cost of Prosecution Circuit," and again citing section 938.27, identified as "Cost of Prosecution City Ord." Section 938.27, however, does not permit local governments to impose higher standard costs of prosecution. Rather, it authorizes the standard costs ($50 for misdemeanors, $100 for felonies), and higher amounts "upon a showing of sufficient proof of higher costs incurred." § 938.27(8), Fla. Stat. (2019). Because no such showing was made in this case, we strike the portion of the order imposing costs pursuant to a city ordinance.

Second, we strike the costs imposed pursuant to section 318.18(11)(b), Florida Statutes (2019), as Prive was not charged with a traffic infraction. *See Sorenson v. State*, 291 So.3d 630 (Fla. 5th DCA 2020).

AFFIRMED; REMANDED WITH INSTRUCTIONS.

EVANDER, C.J., GROSSHANS and SASSO, JJ., concur.

All Citations

301 So.3d 440 (Mem), 45 Fla. L. Weekly D1164

Footnotes

1 *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

Jonathan Tyler Prive Sentenced to Three Life Terms For Capital Sexual Battery on a Child

By Space Coast Daily // July 3, 2019

case was investigated by Brevard Sheriff's Office and U.S. Immigration and Customs Enforcement's Homeland Security Investigations

At a press conference on Tuesday afternoon, Brevard County Sheriff Wayne Ivey and Assistant State Attorney Kathy Speicher announced the sentencing of 31-year-old Jonathan Tyler Prive of West Melbourne to three life terms, plus an additional 15 years, in prison in

relation to conviction on charges that include two counts of capital sexual battery, traveling to meet a minor and lewd and lascivious assault.

BREVARD COUNTY, FLORIDA – At a press conference on Tuesday afternoon, Brevard County Sheriff Wayne Ivey and Assistant State Attorney Kathy Speicher announced the sentencing of 31-year-old Jonathan Tyler Prive of West Melbourne to three life terms, plus an additional 15 years, in prison in relation to conviction on charges that include two counts of capital sexual battery, traveling to meet a minor and lewd and lascivious assault.

Prive was convicted Monday on two counts of sexual battery on a child under 12, one count of lewd and lascivious molestation of a child under 12 and one count of unlawful traveling to meet a minor.

Prive had been sentenced in April 2015 to 30 years and 5 months in federal prison by Senior United States District Judge John Antoon II, for attempting to induce a minor to engage in illegal sexual activity using the Internet.

In addition, the Court at that time ordered Prive to serve a life term of supervision and to register as a sex offender upon his release from prison.

Prive pleaded guilty on August 27, 2014.

According to court documents, in September and October 2013, an undercover agent with the Brevard County Sheriff's Office conducted an investigation into an individual identified as Michael Glenn Glascock.

The undercover investigation revealed that Glascock was sexually abusing a three-year-old child victim, producing child pornography images of the minor victim, and distributing some of these images to others.

Sheriff's Office agents arrested Glascock at his residence in Brevard County, located the child victim, and executed a search warrant at Glascock's residence. A forensic examination of Glascock's electronic devices and a review of his email accounts revealed emails between Prive and Glascock.

In these emails, the two discussed a prior incident where Prive had sexually abused the child victim at Glascock's home, while Glascock was present. After discovering these emails, the undercover agent used Glascock's email account to initiate online communications with Prive.

Sheriff's Office agents arrested Michael Glenn Glascock at his residence in Brevard County, located the child victim, and executed a search warrant at Glascock's residence. A forensic examination of Glascock's electronic devices and a review of his email accounts revealed emails between Prive and Glascock. (BCSO image)

On November 4, 2013, and November 5, 2013, Prive communicated with the undercover agent via the Internet and emails, and arranged to meet the agent, who was posing as Glascock in these emails, for the purpose of engaging in illegal sexual activity with the child victim for a second time.

Prive agreed to meet at a residence in Brevard County, where Prive thought the minor victim would be present. Agents followed Prive as he traveled to the street where this residence was located. Before Prive arrived at the residence, agents arrested him and recovered a packet of lubricant that he had brought for his planned sexual encounter with the child victim.

On August 18, 2014, Glascock pleaded guilty to producing child pornography and attempted online enticement of a minor. On February 6, 2015, Judge Antoon sentenced him to life in federal prison.

"I applaud Senior United States District Judge John Antoon for evaluating the disturbing facts and rendering justice to ensure that this monster can never harm another child," said Brevard County Sheriff Wayne Ivey.

"I have the utmost respect for these incredible men and women who investigate and prosecute these horrific cases to save children and arrest those who victimize and exploit our most precious citizens. Thank you to all involved for making Brevard County a safer place to live and raise our families."

SHERIFF WAYNE IVEY: "I have the utmost respect for these incredible men and women who investigate and prosecute these horrific cases to save children and arrest those who victimize and exploit our most precious citizens. Thank you to all involved for making Brevard County a safer place to live and raise our families."

COMBINED EFFORT

This case was investigated by the Brevard County Sheriff's Office and U.S. Immigration and Customs Enforcement's Homeland Security Investigations. It was prosecuted by Assistant United States Attorney Andrew C. Searle.

This case was brought as part of Project Safe Childhood, a nationwide initiative launched in May 2006 by the Department of Justice to combat the growing epidemic of child sexual exploitation and abuse.

Led by United States Attorneys' Offices and the Criminal Division's Child Exploitation and Obscenity Section, Project Safe Childhood marshals federal, state and local resources to locate, apprehend and prosecute individuals who sexually exploit children, and to identify and rescue victims.

For more information about Project Safe Childhood Click Here.

 Related Story:
West Melbourne Man Sentenced To 30 Years For Enticement of Minor

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278 So.3d 690 (Table)
Unpublished Disposition
(This unpublished disposition is referenced in the Southern Reporter.)
District Court of Appeal of Florida, Fifth District.

Joseph PALLANTE III, Appellant,
v.
STATE of Florida, Appellee.

Case No. 5D17-3543
|
Decision filed May 28, 2019

Appeal from the Circuit Court for Brevard County, William David Dugan, Judge.

Attorneys and Law Firms

James S. Purdy, Public Defender, and Andrew Mich, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Douglas T. Squire, Assistant Attorney General, Daytona Beach, for Appellee.

Opinion

PER CURIAM.

***1** AFFIRMED.

ORFINGER, COHEN and WALLIS, JJ., concur.

All Citations

278 So.3d 690 (Table), 2019 WL 2320981

End of Document

Jury Finds Former Brevard County attorney uilty of 50 Criminal Counts Including Sexual Battery On Child Under 12

Article Of Interest, Misc News

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CA Lawyer Robert D Rodriguez Complaint "DOXING"

David Michael Ellis & Attorney Robert D Rodriguez ACCUSED OF "DOXING"

BARCOMPLAINT. COM FILES BAR COMPLAINT AGAINST RO D RODRIGUEZ

Former attorney or not, attorney Joseph Pallante III is through. He will be spending the rest of his life in prison.

Jury Finds Former Florida attorney Joseph Pallante III Guilty of 50 Criminal Counts Including Sexual Battery On Child Under 12

FOUND GUILTY OF MULTIPLE LIFE FELONIES

Robert D Rodriguez Draws Yet Another CA State Bar Complaint

Michael Patrick Harnden Accused Of Stealing Clients Money & Abandonment

Attorney Robert D Rodriguez Suspended For Beating Girlfriend & Not Paying Child Support

Arizona State Bar To Examine Family Law Attorney JOE ROMLEY Mental Ability To Practice Law

SHIPCHAIN Aaron Kelly Under Investigation For Crytpto Currency Scam

Daniel R Warner Aaron Kelly Fraud Investigation PLEA AGREEMENT

Harassment Complaint F

A Brevard County Jury heard testimony and reviewed evidence in a trial lasting more than three weeks before finding Joseph Pallante III guilty of multiple life felonies on Wednesday night.

BREVARD COUNTY • VIERA, FLORIDA – A Brevard County Jury heard testimony and reviewed evidence in a trial lasting more than three weeks before finding Joseph Pallante III guilty of multiple life felonies on Wednesday night.

Charges included Sexual Battery on a Child under 12, Sexual Battery by a Person with Familial Custody, and felony counts that included Lewd and Lascivious Molestation, and Possession of Child Pornography.

Hearing closing arguments of Assistant State Attorneys Justin Keen and Kathryn Speicher Tuesday evening, the jury returned their verdict shortly after 2 a.m. Wednesday morning.

"We are grateful for the thoughtful and dedicated hard work of the jury," said Keen.

"They understood the horrific abuse the victim had undergone and held the defendant responsible."

With the jury convicting Pallante on more than 50 criminal counts, including two that carry mandatory life sentences, Kathryn Speicher said, "He'll never have the opportunity to victimize another child."

Sentencing for Pallante, a former attorney, is set for November 13 at 10:30 a.m. in front of Judge David Dugan at the Moore Justice Center in Viera.

Against Attorney Joe Romley

JOE M ROMLEY STATE BAR COMPLAINT EXPOSES FRAUD CLAIMS

Phoenix Attorney Joe Romley Practicing Law 53 Years: When is old too old.

Old Dog – Won't Learn New Tricks: Phoenix Attorney Timothy Forshey Repeats History of Repugnant Conduct Toward Others.

Attorney Timothy Forshey Accused Of FRAUDULENT BILLING.

Michael Harnden Accused Of Abandoning More Cases

Attorney Timothy Forshey Accused Of FAKE BILLING SCHEME

MICHAEL HARNDEN DRAW

CURRENT CHARGES

Statue	Description	Counts	Docket No.	Agency Case No.	Judge	Charge Date	Agency	Ref. Number	Remarks
794.011.2a	Sex Battery Victim <12 Offender >18	2	14CF015443A	140770	Dugan, David	02/14/2014		2014-90427051	
794.011.2a	Sex Battery Victim <12 Offender >18	5	14CF015443A	140770	Dugan, David	02/14/2014		2014-90427052	
794.011.8b	Sex Battery by Custodian Victim >12 <18	2	14CF015443A	140770	Dugan, David	02/14/2014		2014-90427053	
794.011.8b	Sex Battery by Custodian Victim >12 <18	1	14CF015443A	140770	Dugan, David	04/09/2014		2014-90427054	
800.04.5b	Lewd Lasc Molest Offender >18 Child<12	2	14CF015443A	140770	Dugan, David	02/14/2014		2014-90427055	
800.04.5b	Lewd Lasc Molest Offender >18 Child<12	2	14CF015443A	140770	Dugan, David	02/14/2014		2014-90427056	
800.04.5c2	Lewd Lasc Molest Offender >18 Child >12<16	3	14CF015443A	140770	Dugan, David	02/14/2014		2014-90427057	
800.04.5c2	Lewd Lasc Molest Offender >18 Child >12<16	1	14CF015443A	140770	Dugan, David	04/09/2014		2014-90427058	
800.02	Unnatural and Lasc Act-Sex Offenses	2	14CF015443A	140770	Dugan, David	02/14/2014		2014-90427059	
827.071.5	Poss View Material Depicting Child Sex Conduct	1	14CF015443A	140770	Dugan, David	02/14/2014		2014-90427060	
827.071.5	Poss View Material Depicting Child Sex Conduct	23	14CF015443A	140770	Dugan, David	02/14/2014		2014-90427061	
847.0133	Sell Obscene Material to Minor	1	14CF015443A	140770	Dugan, David	02/14/2014		2014-90427062	
827.04.1	Contribute Delinquency of Child	1	14CF015443A	140770	Dugan, David	02/14/2014		2014-90427063	
827.071.5	Poss View Material Depicting Child Sex Conduct	3	14CF015443A	140770	Dugan, David	02/09/2017		2017-00005341	
794.011.8b	Sex Battery by Custodian Victim >12 <18	6	14CF015443A	140770	Dugan, David	02/14/2014		2017-00027850	
800.04.5b	Lewd Lasc Molest Offender >18 Child<12	3	14CF015443A	140770	Dugan, David	02/14/2014		2017-00027851	
794.011.2a	Sex Battery Victim <12 Offender >18	1	14CF015443A	140770	Dugan, David	02/14/2014		2017-00034191	
847.0133	Sell Obscene Material to Minor	1	14CF015443A	140770	Dugan, David	02/14/2014		2017-00034192	
827.071.5	Poss View Material Depicting Child Sex Conduct	10	14CF015443A	140770	Dugan, David	02/09/2017		2017-00034193	

A Brevard County Jury heard testimony and reviewed evidence in a trial lasting more than three weeks before finding Joseph Pallante III guilty of multiple life felonies on Wednesday night. Charges included Sexual Battery on a Child under 12, Sexual Battery by a Person with Familial Custody, and felony counts that included Lewd and Lascivious Molestation, and Possession of Child Pornography.

Source: Space Coast Daily

Former Brevard County attorney Joseph Pallante convicted of 50 sex crimes

A former general practice attorney was convicted of sexual battery on a child less than 12 years old, possession of child pornography and dozens of other offenses Wednesday.

A jury met until 2 a.m. Wednesday to convict Joseph Pallante, 48, of Satellite Beach, guilty of the crimes, the State Attorney's Office said. Pallante's trial started in mid-August.

In February 2014, Satellite Beach police charged Pallante with the crimes, including sexual battery by a person with familial custody, and lewd and lascivious molestation.

Sentencing is scheduled at 10:30 a.m. Nov. 13 in front of Judge David Dugan. Some of the convictions for Pallante carry life sentences.

The Florida Bar said Pallante is no longer licensed to practice law.


S 3 BAR COMPLAINTS FOR ABANDONING CLIENTS

Giordano Spanier & Heckele


Attorney Barry Rorex Illegally Practicing Law While Suspended For Abandoning Clients

Arizona Bar Accuses Libel Lawyers of Suing Fake Defendants

Robert Anglen Arizona Republic Still A Hack Writer Critics Say.


Attorney Joe M Romley Accused Of Submitting Fake Documents To Court


Gammaville LLC Accountant Elizabeth "Liz" Price Accused Of Fraud In Fake Accounting Scheme

Gammaville Accountant

Brevard County Jury Finds Woman Not Guilty of Aggravated Assault, Aggravated Battery

*By **Space Coast Daily** // June 26, 2019*

After a three day trial, a Brevard County Jury found 38-year-old Umme Ferdousy Not Guilty of Aggravated Assault upon a Person 65 Years or Older and Aggravated Battery Upon a Person 65 Years or Older in connection with incidents involving her elderly mother and father in-law.

BREVARD COUNTY, FLORIDA – After a three day trial, a Brevard County Jury found 38-year-old Umme Ferdousy Not Guilty of Aggravated Assault upon a Person 65 Years or Older and Aggravated Battery Upon a Person 65 Years or Older in connection with incidents involving her elderly mother and father in-law.

Ferdousy was arrested on January 30, after Melbourne Police investigated reports she had abused her live-in elderly mother and father in-law.

was charged with Aggravated Battery and Assault Upon a Person 65 years of age or older, after reportedly threatening and using a knife to stop her mother in-law from getting food.

Assistant State Attorney Kathryn Speicher argued the case before the Court and presented evidence to the Jury that Ferdousy had committed the crimes.

Testimony of the victims was compelling but required the use of a translator as they only spoke Bengali.

Ultimately, the Jury didn't find sufficient evidence of guilt and acquitted Ferdousy.

In a statement after the verdict was rendered Speicher said, "I appreciate the hard work of the jury in carefully considering all of the evidence in this case." She also added, "We always fight hard for victims, but sometimes the jury doesn't agree. It's a difficult job and I have the utmost respect for their decision."

Ferdousy was released from custody and all previously imposed sanctions were lifted.

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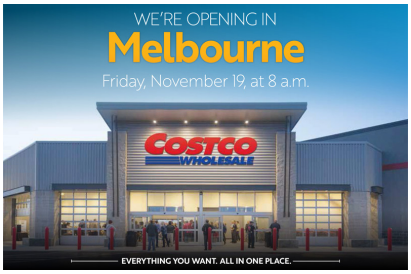

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257 So.3d 460 (Table)
Unpublished Disposition
(This unpublished disposition is referenced in the Southern Reporter.)
District Court of Appeal of Florida, Fifth District.

Miratel CAPITAINE, Appellant,
v.
STATE of Florida, Appellee.

Case No. 5D17-2038
|
Decision filed October 16, 2018
|
Rehearing Denied November 21, 2018

Appeal from the Circuit Court for Brevard County, Jeffrey Mahl, Judge.

Attorneys and Law Firms

Miratel Capitaine, Wewahitchka, pro se.

Pamela Jo Bondi, Attorney General, Tallahassee, and Lori N. Hagan, Assistant Attorney General, Daytona Beach, for Appellee.

Opinion

PER CURIAM.

***1** AFFIRMED.

COHEN, C.J., and EVANDER and LAMBERT, JJ., concur.

All Citations

257 So.3d 460 (Table), 2018 WL 5099620

End of Document

310 So.3d 1147 (Mem)
District Court of Appeal of Florida, Fifth District.

Miratel CAPITAINE, Petitioner,
v.
STATE of Florida, Respondent.

Case No. 5D20-2698
|
Opinion filed February 19, 2021

Petition for Writ of Habeas Corpus, A Case of Original Jurisdiction.

Attorneys and Law Firms

Miratel Capitaine, Orlando, pro se.

No Appearance for Respondent.

Opinion

PER CURIAM.

This Court earlier denied Petitioner's petition for writ of habeas corpus stemming from Brevard County Circuit Court Case Number 2017-CF-10078-A. Because it appears that Petitioner's filings are abusive, repetitive, malicious, or frivolous, Petitioner is cautioned that any further similarly inappropriate pro se filings in this Court asserting claims stemming from Brevard County Circuit Court Case No. 2017-CF-10078-A may result in sanctions such as a bar on pro se filing in this Court and referral to prison officials for disciplinary proceedings, which may include forfeiture of gain time. *See* § 944.279(1), Fla. Stat. (2020); *State v. Spencer*, 751 So. 2d 47 (Fla. 1999).

LAMBERT, EDWARDS, and EISNAUGLE, JJ., concur.

All Citations

310 So.3d 1147 (Mem), 46 Fla. L. Weekly D405

End of Document

Police: Man used West Melbourne hotel for sex trafficking

J.D. Gallop, FLORIDA TODAY Published 3:54 p.m. ET Jan. 3, 2017 | **Updated 4:22 p.m. ET Jan. 3, 2017**

(Photo: Brevard County Sheriff's Office)

A 40-year-old Orlando man who police said used a West Melbourne hotel room to arrange for men to have paid sexual encounters with women on New Year's Day was booked into jail on Monday.

Officers also recovered multiple drugs in a plastic bag found stuffed in a mattress in the room, including cocaine, heroin, Xanax and other drugs that West Melbourne investigators said were used to keep the women awake as they carried out sex acts.

Miratel Geffy Capitaine was arrested after authorities were called Jan. 2 to investigate reports of a woman screaming for police to help her at the Hampton Inn at 194 Dike Road. Capitaine was charged with using coercion for commercial sex activity of an adult, possession of heroin with intent to sell, possession of cocaine and possession of a controlled substance.

Melbourne man accused of shooting into occupied car (https://www.floridatoday.com/story/news/crime/2017/01/01/melbourne-man-accused-shooting-into-occupied-car/96056150/)

Man in 'Deadpool' shirt breaks into Titusville's Playalinda, Bar IX (https://www.floridatoday.com/story/news/crime/2016/12/28/titusville-playalinda-brewing-barix-robbery-breakin-deadpool-florida/95924494/)

Brevard County Sheriff's Office deputies and West Melbourne police responded and took Capitaine, who had an unrelated warrant for his arrest on home invasion and aggravated assault charges out of Orange County, into custody.

West Melbourne police said Capitaine kept the women in fear and used a personal cellphone to operate a backpage.com advertisement for the women. Authorities involved in several sex trafficking-related stings over the last year have reported that the site is frequently used to advertise meetings with women.

Police said Capitaine also coached the women to get on the phone to talk with potential clients. He met one of the women – who authorities said was addicted to painkillers – in Deltona after she asked for a ride to a store. Another woman was found by Capitaine in Orlando. Both were brought to Brevard County, where Capitaine had one of the victims book a room at the Hampton Inn in West Melbourne, reports show.

Palm Bay car burglars part of countywide problem (https://www.floridatoday.com/story/news/2016/12/28/palm-bay-car-burglars-part-countywide-problem-say-police/95904928/)

There, one of the women told authorities that Capitaine arranged for her to perform sexual acts with at least three to four men for money on New Year's Day. He also did not feed one of the women involved, ordering pizza and refusing to allow her to eat, authorities said. The other woman told police that Capitaine "set her up" with two customers and took the money after she was forced to perform sexual acts against her will.

On Jan. 2, one of the women asked Capitaine to go out for a smoke as he was sitting in front of a television, nodding off to sleep. The woman went outside and screamed at a passing patrol car for help.

Capitaine is being held without bond at the Brevard County Jail Complex.

Contact Gallop at 321-242-3642, jdgallop@floridatoday.com and on Twitter at @jdgallop.

Read or Share this story: http://on.flatoday.com/2j1v7ZR

181 So.3d 505 (Table)
Unpublished Disposition
District Court of Appeal of Florida,
Fifth District.

George FIELDS, Appellant,
v.
STATE of Florida, Appellee.

No. 5D14–1170.
|
Nov. 3, 2015.
|
Rehearing Denied Dec. 8, 2015.

Appeal from the Circuit Court for Brevard County, Robert A. Wohn, Jr., Judge.

Attorneys and Law Firms

James S. Purdy, Public Defender, and Nancy Ryan, Assistant Public Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

Opinion

PER CURIAM.

***1** AFFIRMED.

TORPY, BERGER and WALLIS, JJ., concur.

All Citations

181 So.3d 505 (Table), 2015 WL 6777308

End of Document

281 So.3d 573
District Court of Appeal of Florida, Fifth District.

George FIELDS, Appellant,
v.
STATE of Florida, Appellee.

Case No. 5D18-2786
|
Opinion filed October 11, 2019

Synopsis
Background: Defendant was indicted for first-degree murder with a firearm and later convicted after trial of lesser-included offense of second-degree murder with a firearm. Defendant was sentenced to serve life in prison with a 25 year mandatory-minimum provision. The Circuit Court, 18th Judicial Circuit, Brevard County, David Dugan, J., denied defendant's motion for postconviction relief asserting ineffective assistance. Defendant appealed.

Holdings: The District Court of Appeal, Lambert, J., held that:

self-defense jury instruction correctly stated the law;

counsel was not deficient in failing to file Stand Your Ground motion to dismiss; and

trial counsel's decision not to call defendant's brother as a witness was reasonable trial strategy.

Affirmed.

***574** 3.850 Appeal from the Circuit Court for Brevard County, David Dugan, Judge.

Attorneys and Law Firms

Matthew J. Troccoli, of Law Offices of Matthew Troccoli, P.A., Miami, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

Opinion

LAMBERT, J.

George Fields appeals from a final order denying his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. For the following reasons, we affirm.

In May 2010, Fields shot and killed Rayshon Kenerly. He was indicted for first-degree murder with a firearm and was later convicted after trial of the lesser-included offense of second-degree murder with a firearm. Fields was sentenced to serve life in prison with a twenty-five-year mandatory-minimum provision. His direct appeal of this conviction and sentence was affirmed by this court without opinion. *Fields v. State*, 181 So. 3d 505 (Fla. 5th DCA 2015).

Fields then timely filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, in which he raised four grounds for relief. He asserted that his trial counsel rendered constitutionally ineffective assistance by: (1) failing to object to and essentially conceding to a self-defense jury instruction that, in Fields's view, incorrectly instructed the jury that he had a duty to retreat before using deadly force; (2) failing to file a pretrial "Stand Your Ground" motion to dismiss under section 776.032(1), Florida Statutes (2010), arguing that he was immune from prosecution because his use of deadly force was justified; (3) failing to call Fields's brother, Terry Fields ("Terry"), to testify as a witness at trial; and (4) failing to move for a mistrial due to the alleged misconduct of one of the jurors. The postconviction court held an evidentiary hearing on the third ground, at which Fields, his brother, and his trial counsel testified. The court then entered the final order now ***575** under review, denying all grounds raised in the motion. In this appeal, Fields is challenging the denial of grounds one, two, and three.

The altercation that led to Kenerly's death was over money allegedly owed to him by Terry, who ran a car detailing business that was owned by Fields. Kenerly believed that Terry owed him $20 for some car detailing work that he had done, and he arranged to meet with Fields and his brother to collect his money. Fields and Terry drove to meet Kenerly; at which point, Terry handed Kenerly $10. Kenerly was upset about not being paid in full; and, shortly thereafter, he made several heated phone calls to Terry, demanding the additional

$10. During one of these calls, Kenerly allegedly threatened to kill Terry.

Fields and Terry decided to meet again with Kenerly. They left home and drove back to the same location. Kenerly was still present at this site and was accompanied by his brother, Jerome Kenerly. Trial testimony conflicted over what happened next. Fields testified that Terry exited the car and that as he and Kenerly were about to get into a fight, Fields saw Kenerly reach towards his back pocket to remove what Fields perceived to be a gun. Fields warned Kenerly to get his hand out of his pocket, to no avail. Fearing that his brother was about to be shot and being in fear himself, Fields pulled out his own gun and shot Kenerly several times, resulting in his death.

Contrary to Fields's testimony, the State presented evidence that as Fields and his brother were driving up to the eventual site of the shooting, Fields already had his gun sticking out of the car window. Then, after stopping his vehicle, Fields exited with gun in hand, approached Kenerly, and shot him seven times, including twice when Kenerly was lying on the ground. Additionally, the State presented evidence that Kenerly never removed his gun from his back pocket. Fields also gave a statement to law enforcement, which was admitted into evidence at trial, in which he told them that he shot Kenerly with Kenerly's gun. Fields later explained to the jury that he had lied to the police because, as an eight-time convicted felon, he could not lawfully possess a firearm.

Fields's sole defense was that his use of deadly force in killing Kenerly was justified in his defense of Terry. As previously mentioned, his trial counsel did not file what is commonly referred to as a Stand Your Ground pretrial motion to dismiss under section 776.032(1), Florida Statutes (2010). This statute provides a person with immunity from criminal prosecution if he or she uses such force as permitted under sections 776.012, 776.013, or 776.031, Florida Statutes, which, pertinent here, could include Fields's use of deadly force in defending his brother.

Instead, Fields's claim of self-defense was presented to the jury. On this issue, the jury was instructed as follows:

> An issue in this case is whether the defendant acted in self-defense. It is a defense to the offense with which George Lee Fields is charged if the death of Rayshon Kenerly resulted from the justifiable use of deadly force.
>
> "Deadly force" means force likely to cause death or great bodily harm.
>
> A person is justified in using deadly force if he reasonably believes that such force is necessary to prevent
>
> 1. imminent death or great bodily harm to himself or another.
>
> However, the use of deadly force is not justifiable if you find:
>
> 1. George Lee Fields initially provoked the use of force against himself, unless:
>
> ***576** a. The force asserted toward the defendant or another was so great that he reasonably believed that he or another was in imminent danger of death or great bodily harm and had exhausted every reasonable means to escape the danger, other than using deadly force on Rayshon Kenerly.
>
> ....
>
> If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether the defendant was justified in the use of deadly force, you should find the defendant not guilty.
>
> However, if from the evidence you are convinced that the defendant was not justified in the use of deadly force, you should find him guilty if all the elements of the charge have been proved.

The underlying bases or predicates asserted by Fields in the first two grounds of his rule 3.850 motion for relief due to ineffective assistance of counsel are, according to Fields, "nearly identical." In his first argument, Fields contends that, under the facts of the case, he had no duty to retreat before using deadly force and that, therefore, his counsel should have objected to the aforementioned jury instruction that required he exhaust every reasonable means to escape before using deadly force. Fields asserts that not only was the instruction erroneous, it was especially prejudicial to him because he did not try to retreat before shooting Kenerly. Fields argues in his second ground for relief that he was prejudiced when counsel did not file a Stand Your Ground motion to dismiss. Fields contends that this motion, if filed, would have been granted because, based on the facts of the case, he had no duty to retreat and his use of deadly force in shooting Kenerly was justified. Fields separately asserted in this second ground that his trial counsel incorrectly advised him that, as a convicted felon, he was prohibited from filing a motion for immunity from prosecution under section 776.032.

For an ineffective assistance of counsel claim to be successful, a defendant must establish both deficient performance by counsel and prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The deficient performance prong in *Strickland* requires a showing that the lawyer's particular acts or omissions were outside the broad range of reasonably competent performance under prevailing professional standards such that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The second, or prejudice, prong under *Strickland* requires that a defendant show that his or her counsel's deficient performance so affected the fairness and reliability of the proceeding that confidence in the outcome of the trial is undermined. *Id.* Stated simply, a defendant must demonstrate that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 694, 104 S.Ct. 2052. As we explain below, Fields is not entitled to relief because his counsel's performance was not deficient.

Critical to understanding Fields's first ground for relief is the specific language that was contained in the 2010 version of section 776.012, Florida Statutes (2010), which was in effect when he shot and killed Kenerly. Fields correctly points out that in 2010, this statute did not require that a person retreat before using deadly force. In pertinent part, the statute read:

> [A] person is justified in the use of deadly force and does not have a duty to retreat if:
>
> (1) He or she reasonably believes that such force is necessary to prevent ***577** imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony ....[1]

Fields thus contends that his counsel was ineffective for conceding to the use of this erroneous jury instruction as it improperly contained a requirement that he had a duty to retreat before using deadly force. Fields submits that he was prejudiced by his counsel's inaction because he admittedly did not attempt to retreat before shooting Kenerly.

In denying this first ground, the postconviction court found that counsel was not ineffective because the trial court had properly instructed the jury. It held that under section 776.041(2), Florida Statutes (2010), Fields did have a duty to retreat before using deadly force here because the State had presented competent evidence at trial that Fields was the initial aggressor in the altercation that resulted in Kenerly's death. Section 776.041, titled "Use of force by aggressor," specifically provides in pertinent part that

> [t]he justification described in the preceding sections of this chapter is not available to a person who:
>
> ....
>
> (2) Initially provokes the use of force against himself or herself, unless:
>
> (a) Such force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant ....

In *State v. Floyd*, 186 So. 3d 1013 (Fla. 2016), our supreme court explained that section 776.041's language that the "justification described in the preceding sections of this chapter is not available to a person" refers to a person's use of such force under sections 776.012–.013 and 776.031–.032, regarding the defense of the person, the defense of others, the person's right to stand one's ground, and the associated immunities. *Id.* at 1020. The court further held that if there is an evidentiary question at trial as to whether a defendant was the initial aggressor, then the standard jury instruction[2] applying this statute accurately and correctly instructs that if the jury finds that the defendant was the initial aggressor, then the defendant first had a duty to use all reasonable means of escaping from the danger prior to using deadly force. *Id.* at 1021–22.

Thus, in determining whether the postconviction court erred in holding that Fields's trial counsel was not ineffective, ***578** we must first address whether the complained-of jury instruction was a correct instruction of the law and gave the jury sufficient guidance to allow it to reach a verdict based on the evidence before it. *See id.* at 1018–19 (noting that jury instructions need not be academically perfect, but they must be sufficient to provide adequate guidance to enable the jury to arrive at a verdict based on the law as applied to the evidence before it (citing *State v. Bryan*, 287 So. 2d 73, 75 (Fla. 1973))). If so, Fields's counsel's failure to object to the instruction would not constitute deficient performance.

Here, the jury was instructed that Fields was justified in using deadly force against Kenerly if he reasonably believed it necessary to prevent imminent death or great bodily harm to himself or another. Second, the instruction made no mention of Fields's status as a convicted felon in the context of his ability to justifiably use deadly force. Third, the only caveat contained in the instruction was that the use of deadly force was not justifiable if Fields was the initial aggressor, unless the force being used

against him or another was so great that he reasonably believed that he or another was in imminent danger of death or great bodily harm, and he had exhausted every reasonable means to escape the danger other than by using deadly force. Put differently, if the jury did not believe Fields to be the initial aggressor, then the instruction, as given, allowed the jury to find that Fields was justified in his use of deadly force to defend his brother and thereafter to acquit him. Because the evidence at trial presented a jury question as to whether Fields was the initial aggressor, we conclude that the instruction was appropriate under *Floyd* and that it provided the jury with sufficient guidance as to the law to apply to the evidence before it. Accordingly, we agree with the postconviction court that Fields has not shown in ground one of his motion that his counsel was ineffective in failing to object to the jury instruction.

Fields's second ground for relief in his motion and his appeal is that his trial counsel was ineffective for not filing a pretrial motion to dismiss under section 776.032, arguing that he was immune from criminal prosecution for his justifiable use of deadly force. Much like in the first ground of his motion, Fields asserts that his use of deadly force against Kenerly was justified under the 2010 version of section 776.012. Therefore, he reasons that had his counsel filed the motion, it would have been granted and the criminal prosecution against him would have terminated. Fields also argues that his counsel incorrectly advised him that he was unable to file this Stand Your Ground motion because he was a convicted felon.

Although the postconviction court did not set this ground for an evidentiary hearing, Fields's postconviction counsel actually questioned Fields's trial counsel under oath at the hearing held on ground three of his motion why he did not file this pretrial Stand Your Ground motion. As the court wrote in denying this ground, trial counsel testified that because Fields initially lied to law enforcement that he shot Kenerly with Kenerly's gun and also told them that Kenerly had his gun out during the incident, which was not supported by the physical evidence, and with Fields being a convicted felon, he did not reasonably believe that the trial court would have granted the motion to dismiss, if filed.

It appears that Fields is correct that his counsel's position that a convicted felon could not pursue this type of motion was flawed because the 2010 version of section 776.012(1) did not preclude a convicted felon from using a firearm in the defense of another. However, the dispositive issue before ***579** us is whether it was likely that such a motion to dismiss, if filed, would have been granted. If not, then Fields is not entitled to relief under *Strickland* because, by definition, his counsel's performance was not deficient by the failure to file what essentially would have been a meritless motion. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1023 (Fla. 1999) (holding that "[t]rial counsel cannot be deemed ineffective for failing to raise meritless claims or claims that had no reasonable probability of affecting the outcome of the proceeding").

In its order, the postconviction court specifically found that, had the Stand Your Ground motion to dismiss been filed, it would have been denied. It attached to the denial order court records from trial that, in addition to trial counsel's testimony at the rule 3.850 hearing, conclusively support its determination that a pretrial motion to dismiss based upon the applicable Stand Your Ground law, if filed, would have been denied by the trial court.[4] Accordingly, because Fields has not shown error in the postconviction court's analysis or its ruling, or otherwise demonstrated under *Strickland* that his trial counsel was ineffective, we affirm the denial of the second ground of his motion.

Fields next argues that the postconviction court erred in finding that he failed to prove that his counsel was ineffective for not calling his brother, Terry, to testify at trial. Fields asserts that based on the testimony presented at the rule 3.850 hearing, if Terry had been called to testify at trial, he would have established, among other things, that: (1) Kenerly was the aggressor, (2) Fields did not brandish a firearm upon arriving at the scene prior to the shooting, (3) Terry was in fear of Kenerly, (4) Fields was trying to act as a peacemaker by attempting to pay Kenerly the additional $10 owed, (5) Fields admonished Kenerly to remove his hand from his back pocket from where Kenerly was attempting to produce a firearm, and (6) Kenerly had a propensity for violence. Fields asserts that this testimony would have significantly buttressed his self-defense claim and, in all likelihood, would have resulted in an acquittal.

Fields's trial counsel was the final witness at the rule 3.850 hearing. Counsel explained that after consulting with Fields, he ultimately made a strategic decision not to call Terry as a witness. Counsel was concerned that Terry, who is also a convicted felon, had earlier given conflicting statements that he was not in fear of Kenerly at the time and that it was not Kenerly, but a different person, that he saw with a gun. Counsel also testified that Terry too lied to law enforcement about certain facts of this case. Counsel was additionally concerned that if he called Terry as a witness, Terry's testimony could undercut statements that Fields himself had previously provided to law enforcement, thus weakening Fields's

claim of self-defense.

In denying this ground for relief, the postconviction court made extensive findings of fact, thoroughly detailed the testimony presented at this hearing from both Fields and his brother, and thereafter evaluated this testimony against the testimony given by Fields's trial counsel. The court specifically found that counsel's testimony on whether or not to call Terry as a witness was far more credible than that of either Fields or his brother, as it was entitled to do. *See Moore v. State*, 458 So. 2d 61, 61 (Fla. 3d DCA 1984) (recognizing that in a rule 3.850 evidentiary hearing, ***580** the trial court may reject the defendant's testimony in favor of conflicting testimony from trial counsel). The court also essentially found that any discrepancy between trial counsel's testimony and that of Fields and his brother on the underlying facts of the case, as well as counsel's decision not to call Terry as a witness, was resolved against Fields, a finding to which we must give great deference. *See Riggins v. State*, 830 So. 2d 920, 921 (Fla. 4th DCA 2002) (recognizing that "the trial court is in the best position to evaluate the credibility of witnesses" and that appellate courts are "obligated to give great deference to the findings of the trial court" (citing *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001))).

Under *Strickland*, there is a strong presumption that trial counsel's performance was not ineffective and that a court's scrutiny of the attorney's performance "must be highly deferential." 466 U.S. at 689, 104 S.Ct. 2052. Here, the record readily shows that Fields's counsel evaluated the benefit versus the detriment in calling Terry as a witness and then made a strategic decision not to call Terry because, in his view, Terry's testimony could potentially undermine Fields's self-defense claim. *Strickland* cautions that a trial attorney's professional judgment on whether to call a witness at trial is typically not subject to postconviction second-guessing. 466 U.S. at 689–90, 104 S.Ct. 2052; *see also Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." (citing *Rutherford v. State*, 727 So. 2d 216, 223 (Fla. 1998); *State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987))); *Kenon v. State*, 855 So. 2d 654, 656 (Fla. 1st DCA 2003) ("Absent extraordinary circumstances, strategic or tactical decisions by trial counsel are not grounds for ineffective assistance of counsel claims.").

The postconviction court found that as to his claim that counsel was ineffective for failing to call Terry to testify at trial, Fields had failed to establish either prong required under *Strickland*. We conclude that no reversible error has been shown in this ruling.

AFFIRMED.

EDWARDS and EISNAUGLE, JJ., concur.

All Citations

281 So.3d 573, 44 Fla. L. Weekly D2504

Footnotes

1 At the time, there was a bit of an anomaly in the law because a separate statute, section 776.013(3), Florida Statutes (2010), provided that a person who was *not engaged in unlawful activity* had the right to stand his or her ground with deadly force and without a duty to retreat, if the person reasonably believed such force was necessary to prevent death or great bodily harm to himself or herself or another. In contrast, section 776.012 did not have this "unlawful activity" proscription. In 2014, the Florida legislature amended section 776.012, to read consistently with section 776.013, that for a person to be able to use deadly force without a duty to retreat, he or she must not be engaged in criminal activity. However, because Fields's use of deadly force occurred in 2010, the pre-2014 version of section 776.012 applies. *See Miles v. State*, 162 So. 3d 169, 171–72 (Fla. 5th DCA 2015) (holding that under the pre-2014 version of section 776.012, a defendant was allowed to raise a Stand Your Ground defense even if he or she had been engaged in unlawful activity at the time of the offense and irrespective of the "unlawful activity" prohibition found in section 776.013(3)).

2 Fla. Std. Jury Instr. (Crim) 3.6(f).

4 The postconviction court also cogently noted in its order that Fields has not alleged that he would have presented evidence at a pretrial evidentiary hearing on a motion to dismiss different than what he presented at trial.

End of Document

Police: $10 pay dispute led to fatal shooting outside Palm Bay smoothie shop

By **Alan Schmadtke and Susan Jacobson, Orlando Sentinel**

MAY 4, 2010

Ten dollars is all it took for Rayshon Devon Kenerly to die.

Kenerly had argued with his employer for two days over a $10 pay dispute, and on Tuesday the boss settled matters with a gun, police said.

Kenerly, 25, was shot to death today in front of several witnesses outside a smoothie shop in Palm Bay, investigators said. An hour later his employer, George Fields, 42, was arrested on a charge of first-degree murder. Kenerly had worked for Fields on car-detailing jobs.

Fields has a violent criminal past that includes a 15-year prison sentence for aggravated battery with a deadly weapon, authorities said.

Police operators began receiving calls just before noon reporting the shooting in front of Tropical Smoothie Café on Babcock Street. Witnesses told dispatchers they saw a man leave the plaza in a black Lincoln Navigator.

Officers found the sport utility vehicle at Fields' home, where he was arrested. Kenerly's brother, who was present when his brother was shot, identified Fields, police said.

Fields, who has a tattoo on his left arm that reads "Player," was sentenced in 1996 to 15 years in state prison for crimes committed in 1988 and 1989, Florida Department of Corrections records show. He was released in June 2004.

They include aggravated battery with a deadly weapon, possession of a firearm by a convicted felon, attempted robbery with a deadly weapon, burglary and aggravated assault on a law-enforcement officer or emergency-medical worker.

Fields previously was imprisoned for cocaine possession and cocaine sale or purchase, among other crimes.

This 'attr(data-c-typename)' is related to: Shootings, Assault, Theft, Crime, Jails and Prisons

TAB 22

Legal Writing Samples

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

GREGORY STEFAN ALAN BARR,
Defendant.
_____/

CASE NO.: 052021CF033926AXXXXX

STATE'S AMENDED MOTION FOR PRE-TRIAL DETENTION

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and pursuant to Fla. R. Crim. P. 3.132(b) and Fla. Stat. s. 907.041 hereby notifies the Defendant and the Court of the following, and moves this Court to detain the defendant pending the resolution of this case, based on the following grounds and essential facts:

1. The Defendant in this case has been arrested and formally charged with the following offenses: SECOND DEGREE MURDER – RECLASSIFIED WHILE INFLICTING GREAT BODILY HARM OR DEATH (LF) and AGGRAVATED ASSAULT WITH DEADLY WEAPON (F2). ***See attached Information and Probable Cause Affidavits.***
2. The State requests that this court order pretrial detention based upon Fla. Stat. s. 907.041and Fla. R. Crim. P. 3.132(b). In 907.041(4)(c) "the court may order pretrial detention if it finds a substantial probability, based on a defendant's past and present patterns of behavior, the criteria in s. 903.046, and any other relevant facts, that **any** of the following circumstances exist . . ."
    a. **s. 907.041(4)(c)(5)** The defendant poses the threat of harm to the community. The court may so conclude, if it finds that the defendant is presently charged with a **dangerous crime**, that there is a substantial probability that the defendant committed such crime, that the factual circumstances of the crime indicate a disregard for the safety of the community, and that there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons.

i. The defendant is currently charged with two (2) dangerous crimes, as defined in s. 907.041(4)(a)(9) HOMICIDE, and s. 907.041(4)(a)(2) AGGRAVATED ASSAULT. ***See attached Information.***

ii. The State submits that there is a substantial probability that the defendant committed such crime (the defendant confesses, post-Miranda to shooting the victim and there are numerous witnesses to the event) and that the factual circumstances of the crime indicate a disregard for the safety of the community. In this case, the victim was a stranger to the defendant. Specifically, the defendant is alleged to have held a knife to the throat of his friend, John Lindsey. When the victim came to the defense of Mr. Lindsey, the victim punched the defendant and was then immediately shot by the defendant.

iii. The State submits that there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons, based upon the facts of this case.

b. Specifically concerning the element that "there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons," the Defendant was on probation for a Battery charge at the time of this offense in Brevard case 05-2020-MM-033871-AXXX-XX. The allegations in that case were that the defendant threw a plastic bottle with urine inside at the victim in that case. ***See attached probable cause affidavit, judgment / sentence and Violation of Probation affidavit / warrant.***

c. The conditions of probation in that case included the following:

i. (9) You are prohibited from possessing, carrying, or owning any firearm unless authorized by the Court and consented to by the Probation Supervisor.

ii. (10) . . . You shall not knowingly visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed, or used.

iii. (11) Not associate with persons engaged in criminal activities.

d. The defendant, while on probation, possessed and carried a firearm, visited a place where intoxicants – namely alcohol - were being used by multiple under age teenagers.
e. It is clear that there are no conditions of bond that can protect the public since the court had previously ordered the defendant NOT to do the above conditions and he blatantly ignored them.

3. Pursuant to Fla. R. Crim. P. 3.132(b), a motion for pretrial detention may be filed at any time prior to trial. The motion shall be made to the court with trial jurisdiction. On receipt of a facially sufficient motion and determination of probable cause, unless otherwise previously established, that an offense eligible for pretrial detention has been committed, the following shall occur:
    a. (1) In the event of exigent circumstances, the court shall issue a warrant for the arrest of the named person, if the person has been released from custody. The person may be detained in custody pending a final hearing on pretrial detention.
    b. (2) In the absence of exigent circumstances, the court shall order a hearing on the motion as provided in (c) below.
    c. (c) A final order of pretrial detention shall be entered only after a hearing in the court of trial jurisdiction. **The hearing shall be held within 5 days of the filing of the motion** or the date of taking the person in custody pursuant to a motion for pretrial detention, whichever is later.
        i. NOTE: There is additional language in this statute in the event of continuance requests and the procedure for conducting the hearing.
4. The undersigned Assistant State Attorney hereby certifies that the state attorney has received testimony under oath supporting the grounds and the essential facts alleged in this motion.

WHEREFORE, the State of Florida respectfully requests that the Court KEEP the defendant's bond at NONE and grant the State's Motion for Pretrial Detention.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by **E-MAIL** to SCOTT ROBINSON ESQ., Attorney for Defendant, at SCOTTROBINSON@EBPLAW.COM this 27th day of July, 2021.

PHIL ARCHER
STATE ATTORNEY

BY:
/S KATHRYN M. SPEICHER
ASSISTANT STATE ATTORNEY
FLORIDA BAR NO. 0021855
2725 JUDGE FRAN JAMIESON WAY, BLDG D
VIERA, FL 32940
(321) 617-7510, Ext: 59991
Eservice: BrevFelony@sa18.org

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO.: 05-2021-CF-033926-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

v.

GREGORY STEFAN ALAN BARR,

Defendant.

_____/

ORDER GRANTING STATE'S MOTION FOR PRETRIAL DETENTION AND DENYING DEFENDANT'S MOTION FOR BOND

THIS CAUSE came before the Court on the Defendant's Motion to Set Reasonable Bond, filed herein on July 15, 2021 and the State's Motion for Pretrial Detention filed herein on July 15, 2021, amended on July 27, 2021.

Hearings on these motions were held on July 23, 2021, August 5, 2021, August 6, 2021, September 3, 2021, September 8, 2021, and September 14, 2021. The Defendant was represented at these hearings by Attorneys Greg Eisenmenger, R. Scott Robinson, and Robert Berry. Assistant State Attorneys Kathryn Speicher and Susan Stewart represented the State. Based on a review of the Defendant's motion, the State's motions, the official Court file, evidence introduced, testimony heard, evidence examined, and being otherwise fully advised, the Court makes the following findings of fact and conclusions of law:

a. The Defendant is charged in the above-styled case with the second-degree murder of Andre Hutchinas , a Life Felony. § 782.04(2), Fla. Stat. (2020).

The Defendant is also charged with committing an aggravated assault with a knife on John Lindsey. § 784.021(1)(a), Fla. Stat. (2020). These charges are both alleged to have happened on June 25, 2021.

b. The Defendant requests that the Court set a reasonable bond for the Defendant but objected to the State's motions going forward based on their position that the Defendant is not competent. The court has received a report from a court-appointed psychologist concluding that the Defendant is incompetent, a second evaluation with a different psychologist has been scheduled but no judicial finding relating to competency has been made at this time. In the Defendant's Bond Motion, he notes that even though competency is still outstanding, the Defendant is entitled to a bond hearing, citing Eckford v. State, 230 So. 3d 1280 (Fla. 5th DCA 2017). The court overruled the defense objection and both the bond hearing and the State's motions for pretrial detention went forward.

c. In response to the Defendant's request for a reasonable bond, the State moved that the Court hold him on no bond based on: (1) pre-trial detention, pursuant to Rule 3.132(c)(1), Florida Rules of Criminal Procedure, and Section 907.041(4)(c), Florida Statutes (2021) and (2) a determination that the proof of guilt is evident, and the presumption great. State v. Arthur, 390 so. 2d 717 (Fla 1980)

d. This Order addresses the Defendant's motion for bond and the State's motion for pre-trial detention which requires the Court to render its findings within 24 hours of the pretrial detention hearing. 907.041(4)(i), Florida Statutes.

e. Rule 3.132(c)(1) governs pretrial detention and provides that the State has the burden of showing beyond a reasonable doubt the need for pretrial detention of the Defendant pursuant to the criteria in section 907.041, Florida Statutes. The Court finds that the State met that legal burden.

f. The Defendant is charged with second degree murder and aggravated assault which are both "dangerous crimes," as classified under section 907.041(4)(a), Florida Statutes.

g. During the course of the several day hearing, the Court heard from several individuals who were eyewitnesses to this event. Law enforcement also testified about their investigation and what the eyewitnesses observed. Physical evidence, photographs, the Defendant's video recorded statement to the police and video from the scene were also admitted and considered by the court. Based on the evidence presented, the court finds that the following is a fair summary of the facts: The Defendant was at a gathering in a wooded area with several young adults. He was transported there by John Lindsey. Mr. Lindsey and Mr. Barr had a conflict over spilled beer and Mr. Barr pulled a knife out and physically threatened Mr. Lindsey with it. Mr. Lindsey testified that the Defendant put the knife to his throat and he pushed it away. Andre Hutchinas, the victim in this case, presumably observed the disturbance and attempted to verbally intervene between Mr. Lindsey and the Defendant in an effort to deescalate the situation. When he approached the two men, the Defendant thrusted or slashed the knife towards Mr. Hutchinas. Mr. Hutchinas responded by punching the Defendant in the head or face. As the Defendant went to the ground, the

Defendant pulled a firearm out of his waistband and shot Mr. Hutchinas in the neck area. Mr. Hutchinas was immediately incapacitated and died from the gunshot wound inflicted by the Defendant. The Defendant admitted to shooting Mr. Hutchinas in a post-Miranda interview but claimed self defense. There was no evidence that Mr. Hutchinas approached the Defendant in a violent, aggressive or threatening manner.

h. Based on the above facts, the Court finds that the Defendant poses a threat to the community. The court comes to this conclusion based on a finding that the defendant is charged with a dangerous crime(s), that there is substantial probability that the defendant committed such crime(s), and that the factual circumstances of the charged crime indicate a disregard for the safety of the community.

i. The Court finds that there are no conditions of release sufficient to protect the community from the risk of physical harm to persons. In addition to the factual finding made from the evidence presented at the hearings, at the time of the charged offenses, the Defendant was on probation for misdemeanor battery in Case Number 05-2020-MM-033871-AXXX-XX, where he was convicted by plea of throwing a urine-filled plastic bottle at a woman who was struck by the bottle. As a condition of his probation, the defendant was not to possess, carry, or own a firearm unless authorized by the court. The Defendant's violation of this condition of probation supports the above findings.

j. The Court finds a substantial probability, based on the Defendant's past and present patterns of behavior, and giving particular attention to the nature and

circumstances of the charged offenses and the weight of evidence against the Defendant, that the Defendant poses a threat of harm to the community and his bond status should remain the same.

Accordingly, it is **ORDERED AND ADJUDGED:**

1. The Defendant's Motion for Bond is **DENIED.** However, this denial is without prejudice for the Court to consider a detailed plan prepared and submitted by the defense that gives the Defendant an opportunity to obtain the neurological evaluation and treatment he is seeking.

2. The State's Motion for Pre-Trial Detention is **GRANTED.**

3. The Court will address the State's Motion for Proof Evident, Presumption Great in a separate order.

DONE AND ORDERED at the Moore Justice Center, Viera, Brevard County, Florida, this 15 day of September, 2021.

DAVID KOENIG
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I do certify that copies I do certify that copies hereof have been furnished through the E-Portal to the **Office of the State Attorney, Assistant State Attorneys Kathryn Speicher, Esq. and Susan Stewart, Esq.,** BrevFelony@sa18.org and **Gregory Eisenmenger, Esq.,** Attorney for the Defendant, gregeisenmenger@ebplaw.com and **Robert Scott Robinson, Esq.,** scottrobinson@ebplaw.com this 15th day of September, 2021.

Allana Edwards
Judicial Assistant
Moore Justice Center
2825 Judge Fran Jamieson Way
Viera, Florida 32940

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO. 052020CF020434AXXXXX

vs.

JOHN MICHAEL GRAY,
Defendant.
_____/

STATE'S MOTION TO ALLOW LIVE VIDEO TESTIMONY OF WITNESSES

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and hereby moves this Honorable Court to grant the State's Motion to Allow Live Video Testimony.

A. FACTUAL BASIS

1. On March 15, 2020, the Defendant was charged with Aggravated Battery (F2).
2. The victim alleged in the Information, David Paul Alford, is 51 years old and currently resides in the State of Maryland.
3. Mr. Alford is in poor health, and is concerned about the rising cases of COVID-19. Mr. Alford would have to fly from Maryland and attend the jury trial in person.
4. Mr. Alford is a necessary witness to the State's case.
5. Since March 2020, there has been an ongoing COVID-19 pandemic which poses a more significant risk to those with underlying health issues.
6. Live testimony through TEAMS has been used successfully in Brevard County and throughout the State of Florida during this pandemic.
7. The equipment used to arrange the TEAMS testimony, including a large television monitor and modern audio equipment will allow the witnesses to be placed under oath, will allow the witnesses to be cross-examined, will allow the Court and the attorneys to

observe the witnesses' demeanor, and will subject the witnesses to possible penalty for perjury.

8. The State would arrange for the witness to testify at a local court reporter's office in Maryland, thereby adding an element of control to the witness's testimony.

B. MEMORANDUM OF LAW

a. Exceptions to Face-to-Face Confrontation in a criminal prosecution In a Jury Trial

Florida Supreme Court Case and progeny

The Florida Supreme Court in Harrell v. State, 709 So. 2d 1364 (Fla. 1998) addressed the specific issue of whether the admission of witness testimony through the use of a live satellite transmission violated the Sixth Amendment to the United States Constitution, or Article I, Section 16 of the Florida Constitution, where a witness resides in a foreign country and was unable to appear in court.

The Court in Harrell held that "a criminal defendant's right to physically confront his accusers under Confrontation Clause is not absolute and there are certain exceptions where a defendant's right of face-to-face confrontation will give way to considerations of public policy and the necessities of the case." Id. at 1369. The Court then elaborated on when such exceptions were appropriate: "Exceptions to Confrontation Clause's right to physically confront accusers are only permitted when the reliability of the testimony is otherwise assured, and reliability can be exhibited through the other three elements of confrontation, the oath, cross-examination, and observation of the witness's demeanor." Id. The Court in Harrell then went on to provide guidance for determining when an exception to the Confrontation Clause exists: "In order to qualify as an exception to the Confrontation Clause, the proposed procedure must (1) be

justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case, and (2) must satisfy the other three elements of confrontation, that is, the oath, cross-examination, and observation of the witness's demeanor." Id.

Applying the above analysis, the Court held that an exception to the Confrontation Clause to allow for use of live satellite transmission testimony of a witness was justified when "witnesses lived beyond the subpoena power of the court and there was no way to compel their appearance in court, one witness was in poor health and could not make the trip to this country, and both witnesses were absolutely essential to the case as they were the victims of the crime." Id. at 1369-70.

Additionally, the 5th District court of Appeal in Rogers v. State, 40 So.3d 888 (Fla. 5th DCA 2010) notes that "the Confrontation Clause, however, is not absolute in terms of a requirement for *physical confrontation*, and is subject to exceptions where "considerations of public policy and the necessities of the case" require it." Id. at 890. The Rogers case goes on to point out examples where the Florida provide for testimony *without* confrontation, including child victims of sexual crimes when appropriate to spare further trauma, and when a child or person with "mental retardation" may suffer harm by testifying in open court may testify by closed circuit television. Id. It is important to recognize that the 5th District court of Appeal approved the use of satellite technology in a case involving charges of burglary of a structure, grand theft, criminal mischief causing greater than two hundred dollars damage, and resisting an officer without violence. Id. at 889.

b. **Current Florida Supreme Court Emergency Orders Regarding the Covid-19 Pandemic**

During these unprecedented times, the Florida Supreme Court has issued numerous emergency administrative orders providing guidance to the courts for the purpose of "mitigating the impact of COVID-19, while keeping the courts operating to the fullest extent consistent with public safety". See In re: Comprehensive COVID-19 Emergency Measures for the Florida State Courts, Fla. Admin. Order No. AOSC20-23, Amendment 6 (August 12, 2020). There are numerous provisions that guide the court regarding witnesses testifying remotely and are listed below:

I. GUIDING PRINCIPLES

- B. To maintain judicial workflow to the maximum extent feasible, **chief judges are directed to take all necessary steps to facilitate the remote conduct of proceedings with the use of technology.** For purposes of this administrative order, "remote conduct" or "conducted remotely" means the conduct, in part or in whole, of a court proceeding using telephonic or other electronic means.
- D. Judges and court personnel who can effectively conduct court and judicial branch business from a remote location shall do so. **Participants who have the capability of participating by electronic means in remote court proceedings shall do so.**

II. USE OF TECHNOLOGY

- A. All rules of procedure, court orders, and opinions applicable to court proceedings that limit or prohibit the use of communication equipment for the remote conduct of proceedings **shall remain suspended**.

- B. The chief judge of each district court of appeal and each judicial circuit remains authorized to establish procedures for the use, to the maximum extent feasible, of communication equipment for the remote conduct of proceedings, as are necessary in their respective district or circuit due to the public health emergency.
- C. Administering of Oaths
    - (2) If a witness is not located within the State of Florida, a witness may consent to being put on oath via audio-video communication technology by a person qualified to administer an oath in the State of Florida.
    - (3) **All rules of procedure, court orders, and opinions applicable to remote testimony,** depositions, and other legal testimony, including the attestation of family law forms, **that can be read to limit or prohibit the use of audio-video communications equipment to administer oaths remotely or to witness the attestation of family law forms shall remain suspended.**
    - (5) For purposes of the provisions regarding the administering of oaths, the term "positively identify" means that the notary or other qualified person can both see and hear the witness or new attorney via audio-video communications equipment for purposes of readily identifying the witness or new attorney

III. COURT PROCEEDINGS

The following provisions govern the conduct of court proceedings, except as modified by Section X., addressing reversions to a previous phase by a circuit or a county within the circuit.

- E. Other Trial Court Proceedings. Trial court proceedings that are not addressed under Section III.A. or III.D. shall be conducted as follows. All in-person conduct of such proceedings must be consistent with Section III.F.

- (3) **All other trial court proceedings shall be conducted remotely unless a judge determines that one of the following exceptions applies, in which case the proceeding shall be conducted in person:**
    - a. Remote conduct of the proceeding is inconsistent with the United States or Florida Constitution, a statute, or a rule of court that has not been suspended by administrative order; or
    - b. Remote conduct of the proceeding would be infeasible because the court, the clerk, or other participant in a proceeding lacks the technological resources necessary to conduct the proceeding or, for reasons directly related to the state of emergency or the public health emergency, lacks the staff resources necessary to conduct the proceeding.

Further, In Re: Response of the Florida State Court System to Coronavirus Disease 2019 (Covid 19), the Florida Supreme Court ordered that all courts "shall take such mitigating measured as may be necessary to address the effects of the Covid-19 outbreak…including… use of technology, electronic documents, electronic communications, and other court business to mitigate the spread." Fla. Admin. Order No. AOSC20-12, Amendment 1 (September 30, 2020).

In Clarington v. State, 2020 WL 7050095 (Fla. 3d DCA 2020), the third DCA examined the Florida Supreme Court Orders relating to the COVID-19 pandemic and pointed to the Harrell case which notes that the Confrontation Clause right to physically confront accusers is not absolute, and will give way to considerations of public policy and the necessities of the case, citing Maryland v. Craig, 497 U.S. 836 (1990). Even though Clarington dealt with a different scenario (all participants testifying remotely at a Violation of Probation hearing), the Clarington court found the proposed remote conduct . . . is a temporary procedure, and a reasonable one

crafted in response to the current necessities of a public health emergency, and noted that the State (as well as the general public and the victim in particular) have a significant interest in ensuring the effective and expeditious administration of justice. Id. at 9.

C. ARGUMENT

The Florida Supreme Court in Harrell stated, "it becomes quite clear that the courtrooms of this state cannot sit idly by, in a cocoon of yesteryear, while society and technology race towards the next millennium." Harrell, 709 So. 2d at 1372. The State requests that certain witnesses for the jury trial, as listed above, be allowed to testify at the hearing via Microsoft TEAMS. The State can show that both prongs of Harrell are met. Harrell's first prong requires the justification of important state interests, public policies, or necessities of the case. Knox v. State, 98 So. 3d 679, 684 (Fla. Dist. Ct. App. 2012). The State has an interest in prosecuting these cases in a timely fashion. The Florida Supreme Court has expressed its interest in maintaining the health and safety of all during this pandemic. The witness in this case is necessary to the trial as she is the alleged victim.

Harrell's second prong considers the satisfaction of the oath, cross-examination, and observation of the witness's demeanor. Id. As a result of the COVID-19 pandemic, the court and counsel are familiar with TEAMS and the court has the capability of taking testimony via TEAMS. Additionally, as in Rogers, public policy is a current concern. The Florida Supreme Court has made it clear, through numerous administrative orders, that the courts should hold as many proceedings as possible through remote means to help stop the spread of COVID-19, and have suspended the rules and opinions regarding remote testimony. Many of the portions of the most recent administrative order command the courts to allow remote testimony, including

"**Participants who have the capability of participating by electronic means in remote court proceedings shall do so.**"

Accordingly, the State submits that allowing the victim to testify remotely balances the defendants interest against the competing interests at stake and the necessities created by the threat to public health and safety posed by the novel Coronavirus. The State requests that this court GRANT the State's Motion to Allow Live Video Testimony of Witnesses and allow the State's witness, David Paul Alford, to testify at the jury trial remotely.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by **E-MAIL** to OFFICE OF THE PUBLIC DEFENDER - FELONY, Attorney for Defendant, at BREVARDFELONY@PD18.NET this 15th day of January, 2021.

PHIL ARCHER
STATE ATTORNEY

BY: /s KATHRYN M. SPEICHER
KATHRYN M. SPEICHER
ASSISTANT STATE ATTORNEY
FLORIDA BAR NO. 0021855
2725 JUDGE FRAN JAMIESON WAY, BLDG D
VIERA, FL 32940
(321) 617-7510, Ext: 58447
Eservice: BrevFelony@sa18.org

IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY
STATE OF FLORIDA

CASE NO. 05-2020-CF-020434-AXXX-XX

STATE OF FLORIDA,

Plaintiff

vs.

JOHN MICHAEL GRAY,

Defendant

_____/

ORDER GRANTING STATE'S MOTION TO ALLOW LIVE VIDEO TESTIMONY OF WITNESS

THIS CAUSE came to be heard before the Court on February 22, 2021, on the State's Motion to Allow Live Video Testimony of Witnesses filed herein on January 15, 2021, and the Defense's Motion to Strike filed herein on February 2, 2021. (Electronic court documents #51 and #55). Assistant State Attorney Kathy Speicher appeared on behalf of the State of Florida and Attorney Christopher Cochran represented the Defendant. Based on a review of the State's motion, authorities cited, arguments of counsel, and the court file, the Court makes the following findings of facts and conclusions of law:

1. In Case Number 05-2020-CF-20434-AXXX-XX, the Defendant is charged with committing on March 3, 2020, one felony offense of aggravated battery on David Paul Alford.

2. David Paul Alford has moved to Maryland.

3. David Paul Alford is the victim and a necessary witness to the State's case.

4. Mr. Alford testified by telephone and advised counsel and the Court that he suffers from chronic obstructive pulmonary disease (COPD), chronic bronchitis, and high blood pressure. He is concerned that travelling to Brevard County would increase his chance of being exposed to the Coronavirus Disease.

5. In this motion, the State moves for the Court to allow Mr. Alford to testify remotely via Microsoft Teams due to the Coronavirus Disease 2019 (COVID-19) pandemic that the world is currently experiencing and the Florida Supreme Filing Court's specific directive to utilize remote technologies to prevent the spread of the virus. Amendment 9 to 20-23; 18th Jud. Cir. AO 20-28 2nd Amended.

6. The Eighteenth Judicial Circuit currently is in Phase Two. Amendment 9 to 20-23; 18th Jud. Cir. AO 20-28 2nd Amended.

7. Defense counsel objects to Mr. Alford appearing via live-streaming video transmission in lieu of physically appearing at the courthouse in Brevard County, Florida, to testify. The defense argues that the Defendant's rights under the Sixth Amendment Confrontation Clause would be denied if this witness testified remotely. The Defense further points out that lawyers, witnesses, and defendants are frequently and regularly required and do in fact appear in court.

8. The Confrontation Clause reflects a preference for face-to-face confrontation at trial, but that preference is not absolute in terms of a requirement for physical confrontation and is subject to exceptions where considerations of public policy and necessities of the case require it. Maryland v. Craig, 497 U.S. 836, 849 (1990); Rogers v. State, 40 So. 3d 888, 890 (Fla. 5th DCA 2010) (Trial court correctly found that State interest and necessities of the case warranted use of satellite procedure for witness); Harrell v. State, 709 So. 2d 1364, 1368 (Fla. 1998) (Live satellite

testimony from foreign witnesses satisfied the face-to-face element of the Confrontation Clause where defendant and witnesses were able to interact, defense counsel had the opportunity to contemporaneously cross-examine witnesses, and defendant, judge, and trier of fact observed demeanor of witnesses while they testified); Butler v. State, 254 So. 3d 651 (Fla. 4th DCA 2018) (admission of the testimony of victim who resided in a foreign country through satellite live-streaming video did not violate the Confrontation Clause)

9. Reliability of the testimony must be assured through three elements: (1) that the witness will give the testimony under oath, impressing upon the seriousness of the matter and protecting against a lie by the possibility of penalty of perjury; (2) that the witness will be subject to cross-examination; and (3) that the jury will be able to observe the demeanor of the witness, which aids the jury in assessing credibility. Harrell v. State, 709 So. 2d 1364, 1368 (Fla. 1998) (quoting Craig, 497 U.S. at 849-51). The satellite procedure must be: (1) justified, on a case-finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the other three elements of confrontation — oath, cross-examination, and observations of the witness's demeanor. Id.

10. Regarding the specific facts of the subject case to justify the use of TEAMS remote live-streaming testimony: (1) the victim, Mr. Alford lives within the subpoena power of this court; however, he is now living out-of-state in Maryland during a pandemic; (2) Mr. Alford suffers from COPD, chronic bronchitis, and high blood pressure, which the CDC indicates either increase or may increase his risk of severe illness from the COVID -19 virus; (3) Mr. Alford is the named victim in the Information in the above-styled case and as such, is a necessary and material witness; (4) the country is in the middle of a pandemic in which limiting the spread of COVID-19 is a national and state priority; (5) there is an important state interest in resolving this

criminal case in a manner that is both expeditious and just; (6) it is unknown when the pandemic will be over and this case cannot be continued indefinitely to some unknown time when Mr. Alford could safely travel and physically appear in person in Brevard County, Florida, to testify.

11. In the subject case, Mr. Alford will be placed under oath, with verification of his identity. Mr. Alford will be subject to perjury if he testifies falsely and there would be consequences if he were to be charged and convicted of perjury. He will be subject to contemporaneous full cross-examination by the defense as well as re-cross-examination. The parties, the judge, and the jury will be able to observe Mr. Alford's unmasked facial expressions and demeanor as he testifies.

Accordingly, it is **ORDERED AND ADJUDGED:**

(1) David Paul Alford may testify at trial via Microsoft Teams. However, he shall be placed under oath via audio-video communication technology by a court reporter or other person physically present in Maryland that is qualified to administer an oath in the State of Florida. This person shall monitor and ensure that no one else is in the room as Mr. Alford testifies from Maryland.

(2) This is a case-specific decision allowing such live video testimony via TEAMS.

Accordingly, it is therefore **ORDERED** and **ADJUDGED** that the State's Motion to Allow Live Witness Testimony is **GRANTED** as noted above.

DONE and ORDERED on this 1 day of March 2021, in Chambers at the Moore Justice Center, Brevard County, Viera, Florida.

DAVID C. KOENIG
ACTING CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I do certify that copies hereof have been furnished via e-service through the E-Portal to **Office of the State Attorney,** BrevFelony@sa18.org, and **Christopher Tyler Cochran, Esq.,** BrevardFelony@pd18.net pd18efile@pd18.net this 5th day of March, 2021.

Allana Edwards
Judicial Assistant
Harry T. and Harriette V. Moore Justice Center
2825 Judge Fran Jamieson Way
Viera, Florida 32940

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

DA'RIUS TERELL CHRISTIAN,
Defendant.
_____/

CASE NO. 052019CF059392AXXXXX

STATE'S WRITTEN CLOSING ARGUMENT
REGARDING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney and files this State's Written Closing Argument Regarding Defendant's Motion to Suppress Evidence.

I. FACTS

a. On November 3rd, 2019 the Brevard County Sheriff's Office (BCSO) began investigating the death of J.G., the half-sister of the defendant.

b. Based on the investigation by BCSO, it was determined that the manner of death was a homicide, with the cause of death manual strangulation. The only known persons at the residence at the time of the death were the victim and the defendant. There were no signs of forced entry at the residence.

c. Additionally, BCSO agents forensically reviewed the victim's cell phone, which showed that someone had searched on the internet for "how to remove DNA evidence from a crime scene," and "how to remove DNA from a body" at 1:30am or 2am in the morning, which is within the time frame when the victim was killed.

d. On November 4th, 2019, at approximately 3pm the defendant came to the BCSO Criminal Investigation Services building in Rockledge for a non-custodial

interview. During the interview, the defendant's statements to law enforcement placed himself as the murder scene as the ONLY person present other than the victim at the time of the death and internet searches. The defendant also told officers he had left the house at various times that evening outside of the likely time of death and internet searches, including going to the park and 7-11.

e. During the interview, the defendant showed his cell phone and provided a code for his cell phone after he was asked by the deputies if they could see his cell phone. The cell phone remained on the table for the rest of the interview.

f. While being questioned, the defendant was confronted with the fact that the internet searches were made while he was at home. While being confronted with this information, the defendant grabbed his phone and walked out of the interview room.

g. After leaving the room, BCSO agents seized the phone from the defendant and then let the defendant leave. The cell phone was secured in the digital forensic unit until a search warrant was obtained for the defendant's cell phone.

h. At the hearing, Agt. Urbanetz testified that BCSO had concerns that, if the defendant left with his cell phone, information on the cell phone (or the cell phone itself) could be destroyed.

i. Agt. Urbanetz drafted the search warrant affidavit and search warrant for the defendant's cell phone that same date (11/4/2019), and it was signed by Judge David Dugan at 7:59:08pm that same evening (11/4/2019).

j. After the search warrant was signed, BCSO agents searched the contents of the defendant's cell phone.

k. The search warrant affidavit lists seven paragraphs of facts that Judge David Dugan reviewed prior to signing the search warrant.

II. ARGUMENT

a. **CELL PHONE SEARCHES - GENERALLY**

i. The State submits that there was both sufficient probable cause to seize the cell phone and that exigent circumstances also existed prior to seizing the defendant's cell phone.

ii. The two (2) seminal cases in the area regarding cell phone searches are the United States Supreme Court case of Riley v. California, 573 U.S. 373 (2014) and the Florida Supreme Court case of Smallwood v. State, 113 So.3d 724 (Fla. 2013).

iii. In Riley, the United State Supreme Court held that "our answer to the question of what police must do before searching a cell phone ***seized*** incident to an arrest is accordingly simple – get a warrant." Id. at 403.

iv. In Smallwood, the Florida Supreme Court held that "while law enforcement officers ***properly separated and assumed possession of a cell phone from Smallwood's person during the search incident to arrest,*** a warrant was required before the information, data, and content of the cell phone could be accessed and searched by law enforcement." Id. at 740.

b. **CELL PHONE SEIZURE**

i. As highlighted in the bolded / italicized / underlined phrases above, the courts have made a distinction between the **seizure** of cell phones and the **search** of cell phones. Riley states that "our holding, of course, is not that

the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." Id. at 401.

ii. In Riley, however, "both Riley and Wurie concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant . . . That is a sensible concession . . . And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone." Id. at 388.

iii. In this case, the defendant is NOT conceding that officers could seize his cell phone.

iv. However, the facts in this case are similar to Riley. Even though the cell phone in this case was not seized incident to arrest, like in Riley and Smallwood, the standard is still probable cause to seize an item. In this case, at the point where BCSO agents seized the defendant's cell phone, they had probable cause to believe that information pertaining to the homicide of L.G. would be contained on that cell phone.

c. **PROBABLE CAUSE**

i. During the hearing, Agt. Urbanetz laid out the different facts that were known to BCSO prior to the seizure of the defendant's cell phone.

ii. Most, if not all, of those facts were listed in the search warrant affidavit placed into evidence at the hearing.

iii. Judge David Dugan reviewed those facts and found there was probable cause to issue a search warrant.

iv. The facts used to obtain a search warrant of the defendant's phone were the SAME facts known to the officers who seized the defendant's cell phone.

v. If there was sufficient probable cause to search the cell phone, then there was sufficient probable cause to SEIZE the cell phone in this case.

d. **EXIGENT CIRCUMSTANCES**

i. An additional ground to seize the cell phone included exigent circumstances. Agt. Urbantez testified that the BCSO agents were concerned that evidence on the phone could be destroyed if the defendant left the police station with it. Indeed, after the cell phone was seized it was secured in the digital forensic unit until a warrant was obtained.

ii. The Riley case, on pages 388 to 391, lists potential ways that evidence can be destroyed even if the phone is IN police custody, including remote wiping. Law enforcement can take steps to prevent this while waiting for a warrant, such as placing the cell phone in a "Faraday bag" to prevent the phone from received radio waves, as suggested in Riley. In this particular case, that is exactly what law enforcement did. BCSO agents seized the cell phone and then secured the cell phone in the digital forensic unit until a warrant was obtained.

iii. Another Florida case that explains this concept is Hanifan v. State, 177 So.3d 277 (Fla. 2d DCA 2015). In Hanifan, the defendant's cell phone was directly implicated in the defendant's alleged criminal activities. Id. at 278-79. After attempting to contact the defendant, an officer conducted a stop of the defendant and took custody of his cell phone. Id. at 279. In Hanifan, "the iPhone was secured, but not accessed or searched, until the detectives obtained and executed a search warrant." Id.

iv. In Hanifan, the court found the State had met its burden regarding exigent circumstances. The court stated:

> 1. "having been informed of Mr. Hanifan's alleged criminal activity and the likelihood that a smartphone on his person could contain direct evidence of that criminal activity, and then observing what, by all appearances, was an attempt to elude law enforcement officers by driving through two stop signs, there was reasonable justification for the seizure of the iPhone. **The detectives' concerns that Mr. Hanifan could destroy or conceal the iPhone or delete the electronic data and digital images stored on it were reasonable and authorized them to temporarily retain custody of the phone while they obtained a warrant.** *Cf. Riley v. California,* --US---,---, 134 S.Ct. 2473, 2486, 198 L.Ed.2d 430 (2014) (noting petitioners' "sensible" concession "that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant.")

v. In this case, the defendant was being questioned by law enforcement about the type of information that could be found on a cell phone – specifically, the internet searches conducted on the victim's cell phone (which, it presumes, is the same type of information that could be found on the defendant's cell phone). The defendant was leaving the building, taking his cell phone with him, and struggling with officers when they attempted to seize the cell phone.

vi. The agents in this case had a reasonable concern that evidence on the defendant's cell phone could be destroyed, deleted, or the phone itself destroyed or concealed if the defendant left the building with it, similar to law enforcement officers concern in Hanifan.

vii. The State argues that the defense's reliance on Riggs v. State, 918 So.2d 274 (Fla. 2005) is misplaced. Riggs deals with a justified exigent **search** of a residence where a young child was found wandering. Once law enforcement entered the residence, contraband items were seen in plain view, leading to charges in this case.

viii. The issue in this case, however, deals solely with the **seizure** of the cell phone. The agents in this case did NOT **search** the cell phone without a warrant – indeed the agents did exactly what Riley says – they got a warrant.

III. Conclusion

a. Law enforcement did exactly what they should have done in this case; seize the cell phone and then get a warrant.

b. Probable cause clearly existed to seize the cell phone, as it was based on the same facts used to obtain a search warrant only hours later.

c. Based on the foregoing, the court should DENY the defendant's Motion to Suppress Evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by **E-MAIL** to ROGER L WEEDEN ESQUIRE, Attorney for Defendant, at RLWEEDEN@AOL.COM this 24th day of August, 2021.

PHIL ARCHER
STATE ATTORNEY

BY:

/S KATHRYN M. SPEICHER
ASSISTANT STATE ATTORNEY
FLORIDA BAR NO. 0021855
2725 JUDGE FRAN JAMIESON WAY, BLDG D
VIERA, FL 32940
(321) 617-7510, Ext: 59991
Eservice: BrevFelony@sa18.org

Filing # 133869637 E-Filed 09/01/2021 03:28:32 PM

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO.: 05-2019-CF-059392-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

v.

DA'RIUS TERELL CHRISTIAN,

Defendant.

_____/

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

THIS CAUSE came before the Court on July 1, 2021, for a hearing on the Defendant's Motion to Suppress Evidence filed herein on June 16, 2020. (electronic docket identification #29). At the hearing on the Defendant's motion to suppress, the Defendant was represented by Attorney Roger Weeden. The State was represented by Assistant State Attorneys Susan Stewart and Kathryn Speicher. At the motion to suppress hearing, the Court heard testimony from one witness: Agent Phillip Urbanetz with the Brevard County Sheriff's Office called by the State. The defense did not call any witnesses.

Based on a review of the Defendant's motion, the official Court file, testimony heard, evidence introduced, argument of counsel, and authorities submitted, the Court makes the following findings of fact and conclusions of law:

a. The Defendant is charged in the above-styled case with committing on November 2, 2019, and November 3, 2019, the first-degree premeditated murder of J'Meisha Gant by strangulation.

b. Agent Phillip Urbanetz of the Brevard County Sheriff's Office testified that on November 3, 2019, law enforcement was investigating the death J'Meisha Gant, the half-sister of the Defendant. Ms. Gant's mother, Audrey Huey, had called 911 to report her daughter's death. Ms. Huey informed that she had left for the weekend on Friday, November 1, 2019, leaving Ms. Gant and the Defendant at their family residence on Merritt Island, Brevard County, Florida. Ms. Huey returned on Sunday, November 3, 2019, at 4:00 p.m. to find the victim non-responsive. An autopsy revealed that Ms. Gant had been strangled to death.

c. The only known persons at the residence at the time of Ms. Gant's death were the Defendant and Ms. Gant. There were not signs of forced entry at the residence.

d. Ms. Huey voluntarily gave the victim's cell phone to law enforcement. On the victim's cell phone, law enforcement saw searches on "how to remove DNA evidence from a crime scene" and "how to remove DNA from a body" around 1:30 a.m. or 2:00 a.m., the time frame when the victim was killed on Sunday, November 3, 2019.

e. After reviewing the victim's phone, Agent Urbanetz asked the Defendant if he would come to the police station for an interview. The Defendant agreed. The Defendant drove himself and arrived at the Brevard County Sheriff's

Office Criminal Investigation Services building in Rockledge for a non-custodial interview. The recorded interview was conducted on November 4, 2019, at approximately 3 p.m. and was introduced into evidence as State's Exhibit #1. The Court reviewed in chambers State's Exhibit #1. During the recorded interview, the Defendant stated that no one was in the residence, except him and Ms. Gant.

f. At first, the Defendant agreed for law enforcement to see his cell phone (an Apple iphone X) and he gave his cell phone code to police. However, after being probed with more incriminating questions by law enforcement during the interview, the Defendant immediately stopped the interview, grabbed his iphone, and walked out.

g. Agent Urbanetz testified that he was concerned that if the Defendant left with the iphone, the contents on the iphone would be immediately erased or the iphone itself could be destroyed, so Agent Urbanetz seized the Defendant's iphone, but did not access its contents at that time. The Defendant left the premises. Agent Urbanetz placed the iphone in the digital forensic area and it was secured while a search warrant for the cell phone's contents was sought. A search warrant was then obtained from Judge Dugan that same date, November 4, 2019, at 7:59:08 p.m. for police to search the contents of the Defendant's iphone that had been seized.

h. The Court concludes that: (1) there was sufficient probable cause to seize the Defendant's cell phone and (2) exigent circumstances existed prior to seizing the Defendant's cell phone.

i. Law enforcement may legally seize and secure a cell phone in order to prevent imminent destruction of evidence while seeking a search warrant for the cell phone's contents. Riley v. California, 573 U.S. 373, 388 (2014); Smallwood v. State, 113 So. 3d 724, 736 (Fla. 2013). "The State bears the burden of showing that an exigent circumstance, such as the potential destruction of evidence, existed at the time of the seizure; it must also rebut the presumption that a warrantless search is unreasonable." Hanifan v. State, 177 So. 3d 277, 280 (Fla. 2d DCA 2015). The Court finds that the State has met its burden in the above-styled case.

j. The Defendant and the victim were the only two people in the residence at the time of the victim's death and there were no signs of a forced entry into the residence. On the victim's phone were incriminating searches made regarding destroying or removing evidence at or around the time of the victim's death. Police had probable cause to believe that the Defendant's cell phone would provide evidence of criminal activity and thus, could lawfully seize it. Agent Urbanetz believed that the Defendant would either get rid of the iphone or delete its memory, thus, destroying evidence on the phone regarding the murder. Law enforcement lawfully seized the iphone to prevent evidence destruction while obtaining a warrant to look at the contents of the iphone. Hanifan v. State, 177 So. 3d 277, 280 (Fla. 2015).

k. Law enforcement properly obtained a search warrant prior to searching the contents of the Defendant's cell phone.

Accordingly, it is **ORDERED AND ADJUDGED** that the Defendant's Motion to Suppress Evidence is **DENIED.**

DONE AND ORDERED at the Moore Justice Center, Viera, Brevard County, Florida, this 1 day of September, 2021.

DAVID KOENIG
ACTING CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I do certify that copies hereof have been furnished via e-service through the e-portal **Susan Stewart, Esq**. and **Kathryn Speicher, Esq.,** Assistant State Attorneys, Office of the State Attorney, BrevFelony@sa18.org and **Roger Weeden, Esq.,** Attorney for the Defendant, RLWEEDEN@aol.com this 18 day of September, 2021.

Allana Edwards
Judicial Assistant
Moore Justice Center
2825 Judge Fran Jamieson Way
Viera, Florida 32940

TAB 35

Professional Accomplishments

(Quick Reference Guide)

2021 Quick Reference Guide to Frequent Sentencing Issues
By: ASA Kathryn Speicher, Copyright © 2021

SENTENCING

Prohibition on WH: 775.08435
(1)(a) CAN'T on Capital, Life, or First Degree Felony
(1)(b) / (1)(c) / (1)(d) CAN'T on Second Degree Felony / Third Degree Felony if a Crime of Domestic Violence under 741.28 / Third Degree Felony if the defendant has a prior WH, UNLESS
(1)(b,c,d)(1) State Attorney agrees in writing, or
(1)(b,c,d)(2) Court makes WRITTEN findings that WH reasonably justified based on DD factors in s.921.0026.

Gain Time: Fla. Stat. s. 944.275(4)(e) - certain crimes are NOT eligible for gain time for offenses committed on or after 10/1/2014, including s. 782.04(1)(a)2.c.; s. 787.01(3)(a) 2. or 3.; s. 787.02(3)(a) 2. or 3.; s. 794.011 (Sexual Battery), excluding s. 794.011(10); s. 800.04 (all Lewd or Lascivious charges); s. 825.1025; or s. 847.0135(5)

Hearsay: Admissible, however it needs to be accompanied by some "minimal indicia of reliability." Box v. State, 993 So.2d 135, 139 (Fla. 5th DCA 2008). Hearsay is admissible in non-capital sentencing proceedings. McInerney v. State, 2017 WL 1013195 (Fla. 4th DCA 2018).

Downward Departure: Fla. Stat. s. 921.0026 Two-part process 1) Is there a legal and factual basis for a downward departure? and 2) should the court depart from the guidelines? Frequently argued DD reasons:
(d) **Specialized Treatment for Mental or Physical Disability** - State v. Bellamy, 2019 WL 2017383 (Fla. 2d DCA 2019)
(e) **Need for Restitution Outweighs Need for Prison** - State v. Rogers, 250 So.3d 821 (Fla. 5th DCA 2018)
(i) **Cooperate with State** - State v. Lindsay, 163 So.3d 721 (Fla. 5th DCA 2015), State v. Collins, 482 So.2d 388 (Fla. 5th DCA 1985).
(j) **Unsophisticated, Isolated, AND Remorse** - all THREE prongs are required to be met. State v. Hollinger, 253 So.3d 1207 (Fla. 5th DCA 2018). See Lindsay for Remorse
(m) **Post-Adjudicatory Drug Court, 60 points** - State v. Kutz, 157 So.3d 380 (Fla. 2d DCA 2015)
Non-statutory reasons: State v. Chestnut, 718 So.2d 312 (Fla. 5th DCA 1998) - In evaluating a non-statutory mitigating circumstance, the question the trial court should ask is whether the non-statutory reasons for DD meet the legislative policy for departing downward.

Appellate Rights: Defendant must be advised of his right to appeal within 30 days at the time of sentencing. Polk v. State, 884 So.2d 498 (Fla. 5th DCA 2004).

VIOLATION OF PROBATION HEARING

Bond: A person on probation at the time of his arrest does not have a constitutional right to be released prior to his violation of probation hearing. Genung v. Nuckolls, 292 So.2d 587 (Fla. 1974)
Standard of Proof: The State has the burden to prove by a preponderance of the evidence that the defendant violated a condition of probation willfully and substantially (which must be supported by competent, substantial evidence). Mangini v. State, 302 So.3d 1058 (Fla. 5th DCA 2020)

Crawford does not apply: Crawford does not apply to revocation proceedings in the State of Florida (reasoning that they are not "criminal prosecutions.") Peters v. State, 984 So.2d 1227 (Fla. 2008).

Hearsay: Admissible, however can't be the only thing VOP is based upon. "Findings in a VOP proceeding cannot be based solely on hearsay that could not be admitted as substantive evidence in other proceedings . . . the hearsay must be corroborated by non-hearsay." Bell v. State, 179 So.3d 349 (Fla. 5th DCA 2019)

Urine tests: Probation Officer's testimony regarding field drug test personally administered could be used to corroborate lab report (hearsay) which is sufficient, competent, nonhearsay to revoke probation. State v. Queior, 191 So.3d 388 (Fla. 2016). See also Terry v. State, 777 So.2d 1093 (Fla. 5th DCA 2001).
Probation Searches: Evidence is admissible at a VOP Hearing, even though would be inadmissible in the new law violation case. State v. Phillips, 266 So.3d 873, 877 (Fla. 5th DCA 2019)

MOTIONS TO MODIFY OR TERMINATE PROBATION

Mandatory Termination: Fla. Stat. s. 948.04(4)

State can't appeal granting of termination of probation: Even if it is unlawful or direct violation of the plea agreement LaFave v. State, 149 So.3d 662 (Fla. 2014)

Administrative Probation: Fla. Stat. s. 948.001(1) - Defendant can only be transferred to Administrative Probation after satisfactorily completing of half the term of probation. See also s. 948.013,

Sex conditions: Court CANNOT delete statutory sex offender probation conditions. Springer v. State, 965 So.2d 270 (Fla. 5th DCA 2007)
Sex Offender Statute - can't live within 1,000 feet: Fla. Stat. s. 775.212(2)(a) - a person convicted (WH or AG) of a violation of s. 794.011, 800.04, 827.071, 847.0135(5), or 847.0145. NOTE: This applies even when an offender is NOT on probation.

SCORESHEETS	ANTI-MURDER ACT (AMA), s.948.06(8)
Modification of probation: add 6 points (12 for AMA) if defendant pleas to VOP, court modifies the probation. Make sure the court does not "dismiss" the violation, or else can't add points. See Jarvis v. State, 141 So.3d 1262 (Fla. 5th DCA 2014) and Fla.R.Crim.P. 3.704(16) "***10 year rule***": if priors are more than 10 years old and defendant not under any sentence within past 10 years, NONE of the prior history scores. However, if defendant under sentence or even one conviction in past 10 years, ALL prior history scores. See Mancini v. State, 516 So.2d 36 (Fla. 5th DCA 1987) "***Scoresheet Findings***": Alleyne v. United States, 570 U.S. 99 (2013) and Blair v. State, 201 So.3d 800 (Fla. 4th DCA 2016)	***Bond***: Fla. Stat. s. 903.0351 - Defendant who qualifies as violent felony offender of special concern, commits a "qualifying offense" while on probation for a felony offense that occurred on or after 3/12/2007, or otherwise qualifies as AMA is **NOT entitled to bail** or any other form of pre-trial release until resolution of probation hearing (unless only violation is failure to pay costs/fines/restitution). This statute is constitutional, see State v. Lawrence, 219 So.3d 941 (Fla. 4th DCA 2017). See also Fla. Stat. s. 948.06(8)(d) - Defendant must remain held without bond even if ARRESTED for a "qualifying offense."
VOP (normal) *Add 6 points - for all violations except a Felony Conviction (ex: technical violations, Misdemeanor convictions, felony convictions out of county or being sentenced at a different date) *Add 12 points - for all violations involving a Felony Conviction (being sentenced at the same time as the VOP - typically will involve a global plea) ***VOP (AMA)*** *Add 12 points - for all violations except a Felony Conviction (ex: technical violations, Misdemeanor convictions, felony convictions out of county or being sentenced at a different date) *Add 24 points - for all violations involving a Felony Conviction (being sentenced at the same time as the VOP - typically will involve a global plea)	***Who qualifies:*** s.948.06(8) (1) On felony probation / CC related to the commission of a qualifying offense committed on or after 3/12/2007, (2) On felony probation / CC for ANY offense committed on or after 3/12/2007 and has previously been convicted of a qualifying offense (**no date limitation**) see Williamson v. State, 180 So.3d 1224 (Fla. 1st DCA 2015) (3) On felony probation / CC for ANY offense committed on or after 3/12/2007 and has violated that probation / CC by committing a qualifying offense (4,5,6) On felony probation / CC for ANY offense (**no date limitation**) and has previously been found by a court to be a **Habitual Violent Felony Offender (HVFO) (4), Three-Time Violent Felony Offender (TTVFO) (5), or Sexual Predator (6)** and has committed a qualifying offense on or after 3/12/2007
"***22 points statute***": 775.082(10). If being sentenced to F3 that is NOT a forcible felony under s.776.08 and 22 points or fewer, must sentence to non-prison sentence unless court makes "danger to the public" finding - if jury trial, jury must make special finding. "***Defendant scores more than the statutory maximum***" - When statutory maximum sentence is exceeded by lowest permissible sentence under CPC, lowest permissible sentence becomes maximum (and minimum) sentence which trial judge can impose. Butler v. State, 838 So.2d 554 (Fla. 2003). The LPS is an individual minimum sentence which applies to each felony at sentencing for which the LPS exceeds that felony's statutory maximum sentence, regardless of whether the felony is the primary or an additional offense. State v. Gabriel, 314 So.3d 1243 (Fla. 2021).	***Sentencing considerations:*** If court finds a defendant has violated his probation, the court must decide whether or not the defendant is a "danger to the community" using the following criteria in s.948.06(8)(e)(1) . . . (a) The nature and circumstances of the violation and any new offenses charged, (b) the offender's present conduct, including convictions, (c) the offender's amenability to non-incarcerative sanctions . . , (d) the weight of evidence against the offender, (e) any other facts the court considers relevant. If the defendant poses a **danger to the community**, the court **SHALL revoke probation** and SHALL sentence UP to the statutory maximum, or longer if permitted by law. If the defendant does NOT pose a danger to the community, the court may revoke, modify or continue probation. ***Court can't downward depart if defendant a "danger to the community":*** State v. Martinez, 103 So.3d 1013 (Fla. 3d DCA 2012) ***Written Findings***: Findings MUST be written, regardless of whether finds defendant a danger or not. See Barber v. State, 207 So.3d 379 (Fla. 5th DCA 2016)

YOUTHFUL OFFENDER

Statute: Fla. Stat. s. 958.04 (effective 10/1/2019). Applies to offenders if such crime was committed before the defendant turned 21 years of age. Previously offenders needed to be SENTENCED prior to their 21st birthday - no more.
Not eligible: Person being sentenced for a Capital or Life Felony, or who has previously been classified under this act.

Maximum Sentence: 6 years in DOC or statutory max. If a split sentence, maximum incarceration is 4 years DOC. Minimum Mandatory sentences do not apply. The court may withhold adjudication, even on an F1 charge.

VOP - Technical v. Substantive Offenses: Committing a new criminal offense is a substantive violation of probation (ex: positive urine for drugs, admission of using drugs). Thus a defendant can be sentenced in excess of the 6–year limit for youthful offenders. Robinson v. State, 702 So.2d 1349 (Fla. 5th DCA 1997)
Violation of Probation (min/man offenses): Upon revocation of a youthful offender's probation for a substantive violation, the trial court is authorized to either impose another youthful offender sentence, with no minimum mandatory, or to impose an adult Criminal Punishment Code (CPC) sentence, which would require imposition of any minimum mandatory term of incarceration associated with the offense of conviction. Eustache v. State, 248 So.3d 1097 (Fla. 2018)

MANDATORY MODIFICATIONS s.948.06(2)(f)

When required: When ALL of the following are met:
1) Supervision is probation (doesn't apply to community control)
2) Probationer does not qualify as a "Violent Offender of Special Concern"
3) The violation is a low-risk violation, as described in paragraph (9)(b), AND
4) The court has not previously found a Defendant in violation of his probation due to a VOP affidavit.
***NOTE: The statute was changed effective 7/1/21 to change "any" to "all." The 5th has previously applied the absurdity doctrine to change the statute to say "all." Kirk v. State, 2020 WL 5580141 (Fla. 5th DCA 2020)
***NOTE: This statute ONLY applies if the probationer has a SINGLE low-risk technical violation of probation. Schmidt v. State, 2020 WL 7766936 (Fla. 1st DCA 2020)

Exceptions: Waiver by the probationer (2)(f)(1), the probationer has less than 90 days left on probation (court can revoke, but can only sentence up to 90 days in jail).

JESSICA LUNSFORD ACT (JLA) s.948.06(4)

Who qualifies: Under supervision for any offense in Chapter 794, 800.04(4),(5),(6), 827.071, or 847.0145, or is a registered Sexual Offender or Sexual Predator, or on supervision for an offense that would require them to register as Sex Off / Sex Pred, the court must make a finding that the defendant is not a danger to the public" before releasing with or without bail.

Court considerations for "Danger to the Public" hearing: the nature and circumstances of the violation and any new offenses charged; the offender's or probationer's past and present conduct, including convictions of crimes; any record of arrests without conviction for crimes involving violence or sexual crimes; any other evidence of allegations of unlawful sexual conduct or the use of violence by the offender or probationer; the offender's or probationer's family ties, length of residence in the community, employment history, and mental condition; his or her history and conduct during the probation or community control supervision from which the violation arises and any other previous supervisions, including disciplinary records of previous incarcerations; the likelihood that the offender or probationer will engage again in a criminal course of conduct; the weight of the evidence against the offender or probationer; and any other facts the court considers relevant.

MANDATORY MODIFICATIONS s.948.06(2)(f) continued

Low-risk violations (9)(b):
(1) a positive drug or alcohol test result,
(2) failure to report to the probation office,
(3) failure to report a change in address or other required Information,
(4) failure to attend a required class, treatment or counseling session, or meeting,
(5) failure to submit to a drug or alcohol test,
(6) a violation of curfew,
(7) failure to meet a monthly quota on any required probation condition - such as paying restitution, court costs, or community service hours,
(8) leaving the county without permission,
(9) failure to report a change in employment,
(10) associating with a person engaged in criminal activity, or
(11) any other violation as determined by administrative order of the chief judge.

Sentencing Limitations: If criteria met, court can include up to a maximum 90 days in jail in modified sentence.

RESTITUTION HEARING

Burden: Preponderance of the Evidence.
Fla. Stat. s. 775.089(7)(c)
Probation: Restitution "Shall be a condition of probation." Fla. Stat. s. 775.089(4)
Defendant's presence: When a defendant is absent from the restitution proceedings, the State must present competent, substantial evidence proving an effective waiver and unsworn statements that the defendant had notice of the hearing are not sufficient to prove waiver. CCN v. State, 1 So.3d 1151 (Fla. 2d DCA 2009)

Standard: Restitution must be determined on a fair market basis unless the state, victim, or defendant shows that using another basis, including, but not limited to, replacement cost, purchase price less depreciation, or actual cost of repair, is equitable and better furthers the purposes of restitution. Fla. Stat. s. 775.089(7)(b)

Prior Standard: a court is not tied to fair market value as the sole standard for determining restitution amounts, but rather may exercise such discretion as required to further the purposes of restitution. Where it is determined that a restitution amount equal to fair market value adequately compensates the victim or otherwise serves the purposes of restitution, we agree with the court below that the value should be established either through direct testimony (an owner of property is generally qualified to testify to the fair market value of that property - see FN6). Hawthorne v. State, 573 So.2d 330 (Fla. 1991)

Hawthorne Fair Market Value Factors:
1) original market cost,
2) manner in which the item was used,
3) the general conditions and quality of the item, and
4) the percentage of depreciation.

Hearsay: The court **may consider hearsay evidence** for this purpose, provided it finds that the hearsay evidence has a minimal indicia of reliability. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the state attorney. The burden of demonstrating the present financial resources and the absence of potential future financial resources of the defendant and the financial needs of the defendant and his/her dependents is on the defendant. Fla. Stat. s. 775.089(7)(c)

Prior Hearsay Standard: Hearsay evidence may not be used to determine the amount of restitution when there is a proper objection to hearsay—BUT can be used if no objection made. Schenk v. State, 150 So.3d 275 (Fla. 5th DCA 2014)

SEXUAL OFFENDER CONCERNS

Which charges require Sex Offender Probation? See Fla. Stat. s. 948.30(1) - Defendants on supervision for a violation of Chapter 794 (Sexual Battery) , s. 800.04 (L or L offenses), 827.071 (Use of Child in Sexual Performance, Possession of Material Depicting Sexual Conduct of a Child, i.e. child porn), 847.0135(5) (L or L Exhibition using a Computer), or 847.0145 (Selling or buying of Minors). Offenses that do not require sex offender probation, although still require certain statutory conditions, include Failure to Register charges. See s. 948.30(3) & (4)

Which conditions must be pronounced? Statutory sex offender conditions do not need to be imposed, however it is a good idea so the defendant knows which ones apply. Levandoski v. State, 245 So.3d 643 (Fla. 2018). Any non-statutory special conditions MUST be pronounced.
Limitations on modifying "no contact" provision: Fla. Stat. s. 948.30(1)(e). The most the court can grant is "supervised contact," and only IF the defendant is currently in or has completed sexual offender therapy and if a qualified practitioner has done BOTH a Risk Assessment and Safety Plan. The requirements for the risk assessment and safety plan are outlined in the statute.

MOTION FOR RETURN OF PROPERTY

Authority: Fla. Stat. s. 705.105 (if property held as evidence) and case law
Timely: Must be filed within 60 days of the conclusion of the proceeding (Mandate, if appealed - Sentencing, if not).
Adams v. State, 273 So.3d 195 (Fla. 5th DCA 2019)
Procedure: "When the defendant seeks the return of property as the true owner, the applicable procedure is similar to the procedure for the consideration of a motion for post-conviction relief." Bolden v. State, 875 So.2d 780 (Fla. 2d DCA 2004).

Facially Sufficient: Motion must allege the following (per Bolden):
1) The property at issue is the defendant's personal property,
2) the property was not the fruit of criminal activity, and
3) the property was not being held as evidence.
***If facially sufficient, court may either order the State to respond or set an evidentiary hearing.

Defendant NOT entitled to return: Property entered into evidence, State intends to seek forfeiture, or State intends in good faith to use the property in another prosecution where those items admissible in evidence.
Defendant IS entitled to return: The State is unable to connect the items to specific criminal activity and no one else can be identified who can demonstrate a superior possessory interest in the property.

TAB 37

Speeches and Presentations

(Power Point Presentations)

How (not) to Lose a Confession in 10 Ways

Kathy Speicher, Assistant State Attorney – 18th Judicial Circuit
Career Criminal & Firearms Unit
Board Certified in Criminal Trial Law

1

- Miranda Pointers and local examples
- Custodial vs. Non-custodial considerations
- Case Preparation Tips
- Interrogation Do's and Don'ts

2

Miranda v. Arizona
384 U.S. 436 (1966)

- When do Miranda rights need to be given?
  - 1) When a suspect is "in custody," AND
  - 2) Is being asked questions (interrogation) by law enforcement, AND
  - 3) The questions being asked are "testimonial" in nature.

3

1) Threshold question: Is the suspect in "custody" for purposes of Miranda?

- Is there a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest?
  - 4 Ramirez factors:
    - 1) the manner in which police summon the suspect for questioning,
    - 2) the purpose, place, and manner of the interrogation,
    - 3) the extent to which the suspect is confronted with evidence of his or her guilt, and
    - 4) whether the suspect is informed that he or she is free to leave the place of questioning.
- OBJECTIVE test
  - From the viewpoint of a reasonable person in the shoes of the suspect
  - NOT from the viewpoint of the police officer or the suspect
    - i.e., it doesn't matter if the officer or suspect THOUGHT he was in custody, ultimately it is determined by the objective facts as determined by the court.
- Be PREPARED to articulate the facts surrounding the questioning over and above what the suspect says

4

Location & "Free to Leave"

- The place of the interrogation is NOT determinative as to whether or not a person is in custody.
- Issue turns on whether a reasonable person in the suspect's position would have believed himself in custody or deprived of his freedom in a significant way.
- Examples:
  - Told under arrest, placed in handcuffs → IN CUSTODY
  - An inmate in jail → IN CUSTODY
    - Yes, there are VERY limited circumstances where a suspect's statements may not require Miranda, but they are exceedingly rare and typically involve the other prongs of Miranda not being met.
    - **Example**: Defendant speaking to his mother in a room at the jail, confesses to touching a child in a Lewd or Lascivious case. Law enforcement officers OVERHEARD this conversation. The court found there was NO Miranda violation, even though Miranda rights were never read. Confessions to mother were admissible because the defendant had no reasonable expectation of privacy in their conversation – there were numerous signs in the jail that the jail ways always under audio and video surveillance and there was no "custodial interrogation". Liffick v. State, 2021 WL 4450531 (Fla. 1st DCA 2021).
  - A suspect at the police station, told free to leave, person not arrested, door open, not confronted with too much evidence → NOT IN CUSTODY

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Local Example – NOT in custody

- State v. Eduardo Figueroa, 139 So.3d 365 (Fla. 5th DCA 2014)
  - Brevard County, Judge Roberts
  - Facts:
    - Detective & Child Protective Investigator went to a suspect's home to question him
    - Suspect willingly came out of his bedroom to participate in the interview
    - Interview took place in his own living room
    - Detective / Investigator did not coerce, threaten, raise their voices or intimidate suspect
    - Suspect not placed in handcuffs
    - Suspect invited Detective / Investigator to sit at dining room table with him
    - Suspect was NOT advised he was free to leave and WAS confronted with allegations of sexual abuse, suspect was not confronted with evidence so indicative of guilt that a suspect in defendant's position would feel that he was going to be arrested.
  - 5th DCA found Defendant was NOT in custody "for purposes of Miranda" and thus Miranda warnings were not required.

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Local Example – Suspect IN custody

- Sharon Myers v. State, 211 So.3d 962 (Fla. 2017)
  - Trial court granted motion to suppress 2 statements made by the Defendant
  - 5th DCA reversed the trial court, allowing the statements to be entered
  - Florida Supreme Court reversed the 5th DCA, finding that the statements were not admissible
- Facts the court found that indicated the defendant was IN custody
  - Defendant was summoned to the police station, dependent on law enforcement for transportation back to her residence
  - Told she was free to leave, but placed in the corner of a small room with law enforcement blocking her access to the door
  - Immediately and aggressively confronted by multiple officers about her involvement in the murder
    - "tag-team" style, good cop bad cop, accused her of being "full of unadulterated sh[]t"
  - Not reminded that she was not in custody
- Although the Florida Supreme Court suppressed the statements, it also found that the statements were "voluntary" and could be used for impeachment purposes at trial.

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Local Example – Suspect IN custody

- Facts
  - Suspect was located at a local hospital in the ICU
  - Suspect was in the hospital due to a suicide attempt involving taking too many pills
  - At the time police conducted the interview, the suspect was under a Baker Act initiated by hospital staff (NOT law enforcement)
    - The suspect was not free to leave the room, required to have a hospital "sitter"
    - Hospital personnel were milling about the room, trying to figure out what type of pills the suspect had taken
  - Only two officers were present, did not arrest the suspect nor confront with too much evidence
  - Suspect confessed to specific acts, was NOT arrested that day
- Court held that the Defendant was IN custody and that the statement was NOT voluntary

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2) Interrogation → asking questions

- Anytime all 3 prongs are met (custody, questions, testimonial), Miranda needs to be read.
  - Example:
    - Pull over a vehicle for running a red light. 1 driver & 3 passengers inside the vehicle. Driver arrested for DWLS. Officer sees a bag of cocaine in the center console. Officer asks driver "whose cocaine is that?" Driver says, "it's mine."
    - Statement SUPRESSED
    - Saw this on a Brevard COPS episode

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What about the ramblers?

- Without law enforcement asking a question, a suspect starts talking – perhaps in the back of a patrol car on the ride to the jail
  - Let them talk!!
  - Spontaneous statement → since law enforcement is not asking a question, whatever the suspect says is admissible
- Also important, Miranda is only required when it is law enforcement asking the questions.
- Foster v. State, 562 So.2d 808 (Fla. 5th DCA 1990) Brevard County re: spontaneous statements
  - To hold otherwise would require the state to protect an arrestee from herself because she has a loquacious tongue. We do not think ***Miranda*** requires the state to gag a suspect or close its ears.

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Ramblers (continued)

- Law enforcement doesn't have to sit by mute when a suspect is making unsolicited admissions, they can respond – just stay away from asking questions, if possible.
  - Gordon v. State, 213 So.3d 1050 (Fla. 4th DCA 2017)
    - Citing to Miranda, the court stated that "no interrogation occurs where an officer does not initiate a conversation and merely responds to the suspect."
- Local Example:
  - Manslaughter, defendant at hospital
  - Officer started recording on audio recorder, did NOT ask the defendant any questions

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Local Example – Non-law enforcement conducting the questioning

- Facts
  - Suspect, 27 years old, lives at home with his parents
  - Suspect is questioned by a detective (non-custodial) and confesses to committing the crimes
    - In his bedroom
    - Door is open, pathway not blocked
  - Suspect is allowed to gather his shoes and wait for a marked patrol unit to arrive
  - His parents are told that the suspect is being arrested and of what he is being accused.
  - Without law enforcement prompting or involvement, the parents become upset and start yelling at their son, wanting to know if it is true
  - Suspect confesses again to his parents, which is caught on the audio recorder the detective wisely still had recording
- Court found that Miranda rights were not required because, even though the suspect was in custody, he was not being "questioned" by LAW ENFORCEMENT

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3) Testimonial Questioning

- MOST questions an officer will ask, will be testimonial in nature.
- Example: In a DUI crash case (after the accident report portion), asking the suspect "how many drinks did you have?" Suspect replies "8 beers."
- Questions that are NOT testimonial
  - Routine booking questions
    - Date of birth → routine question, but can be used in a trial to prove an element of the crime, the Defendant's age.
    - TIP → in cases where the Defendant's age is an element of the crime (mostly in sex cases), ask the Defendant during the interview his date of birth and current age. It makes proving that element very easy . . .
    - Tobiassen v. State, 213 So.3d 1045 (Fla. 4th DCA 2017) → routine booking question regarding defendant's occupation fell within the "routine booking question" exception to Miranda.
  - Suspect giving a breath sample

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When Miranda is required

- Typically called a "custodial interrogation"
- Tips
  - 1) Give GOOD Miranda warnings
    - First thing an ASA will listen to in a post-Miranda interview is the reading of the Miranda warnings and how they were waived.
    - Follow your agencies card or written form, VERBATIM
      - Don't sum up or put in your own words
      - Miranda requires certain rights be told to the suspect. Even though there is no "magic language" it is best to follow the script
      - Plus, it doesn't look good in court when an officer is testifying that they read Miranda from memory. Inevitably, they will not remember the exact verbiage they used and their credibility may be damaged.
      - It looks much better to the court when an officer can say "Every time I read Miranda I do so from my agency issued card / form, and that is what I did in this case."

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When Miranda is required

- Tips
  - 2) Use a written form
    - Benefits for the officer:
      - Officer knows that they have covered each aspect of Miranda
      - Can show that the suspect has acknowledged each aspect
      - Typically there is biographical information about the suspect (name, date of birth, signature)
      - Often times, the person who witnessed the reading of Miranda warnings is noted
    - Benefits for the State:
      - Certainty that all Miranda rights have been covered & covered correctly
      - Can present to the court and/or jury as proof that the suspect was told their rights and validly waived their rights

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Miranda Florida case example

- Florida v. Powell, 130 S. Ct. 1195 (2010)
  - 4 points of Miranda
    - 1) You have the right to remain silent
    - 2) Anything you say can and will be used against you in a court of law
    - 3) You have the right to have an attorney ***present during questioning***
    - 4) If you cannot afford an attorney, one will be provided at no charge to assist you during questioning.
  - Offending Florida language
    - "talk to a lawyer before answering any of the officer's questions"
  - Supreme Court suggestion
    - "The standard warnings used by the FBI are exemplary. They provide, in relevant part: "You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning." This advice is admirably informative, but we decline to declare its precise formulation necessary to meet Miranda's requirements." Different words were used in the advice Powell received, but they communicated the same essential message."

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Motions to Suppress

- 1) Come to the hearing
  - 2 types of subpoenas → trial vs. hearing
    - If you receive a subpoena for a hearing, you need to come unless called off by the State (or defense, if they sent the subpoena)
    - If a conflict arises, let witness coordinator know ASAP → hearing time in court is set out several months & the parties and judge will appreciate knowing ahead of time so a different hearing can be set
- 2) Review case reports & recordings of statement(s)
- 3) Contact ASA prior to the motion date
  - Review the motion & any concerns the ASA may have
  - If the motion takes issue with a particular portion of the interview, make sure to listen carefully to that portion and be prepared to answer questions
- 4) Arrive early
  - Listen to court copy
  - Initial the CD/DVD

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Motions to Suppress

- Court will typically be looking at 4 issues:
  - 1) Was Miranda required?
  - 2) Was Miranda read properly?
  - 3) Were the Miranda rights properly waived?
  - 4) Was the interview voluntary?
- Test the Court will use:
  - "Totality of the Circumstances"
    - The court will look at each individual fact and weigh each one
    - Typically, it is not a single fact that gets a confession suppressed, it is multiple

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1) Was Miranda Read Properly?

- Make sure that Miranda is read fully, using a card or form – do not deviate or "wing it"
  - State v. Lisa Nowak, 1 So.3d 215 (Fla. 5th DCA 2009)
    - The Astronaut Love Triangle case
    - Allegedly Astronaut Nowak drove many hours from Texas to Florida (OIA) wearing a diaper to confront and kidnap her ex-boyfriend's (also an astronaut) new girlfriend.
    - Statements suppressed → trial court said that the State could not use the statements she made nor the evidence found in her car (she had "consented" to a search during the now-tossed statement)
      - Fruit of the poisonous tree
    - Court found that the State did not prove that she knowingly & intelligently waived her Miranda rights and failed to demonstrate her statements were voluntarily made
    - Even though defendant was a very intelligent person, she was still entitled to have been read full Miranda rights

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1) Was Miranda Read Properly?

- Doctrine of Inevitable Discovery
  - Ultimately, after appeal the State was able to use evidence found in her vehicle
  - Police officers would have found her vehicle tag number and looked for the car at the airport hotel (where the vehicle was found)
  - Officers had probable cause to search the vehicle

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1) Was Miranda Read Properly?

- In addition to making sure that an officer stays "on script" make sure not to minimize and downplay the significance of the Miranda warnings
  - Ross v. State, 45 So.3d 403 (Fla. 2010)
  - Detective downplayed the significance of the warnings, saying it was a "matter of procedure"
  - When the suspect asked if he was going to be arrested (which the officer clearly had PC to make an arrest), the suspect was told they were "merely talking"
  - Minimization / Downplay of Miranda rights was a factor in the court finding that the suspect's statement was not voluntary
  - 1st degree murder conviction reversed

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2) Were the Miranda rights properly waived?

- The State has to show there was a knowing, intelligent & voluntary waiver
- Several factors the court will look at:
  - 1) Ability to understand English
    - Use an interpreter
    - If Spanish interpreter, the interview will only be as good as the interpreter
  - 2) Familiarity with the Justice system
    - Easier for the court to find a suspect waived their rights if they have had numerous encounters with the justice system and have been interviewed by law enforcement previously
  - 3) Physical or Mental condition
    - Suspect on drugs?
    - Rigterink v. State, 193 So.3d 846 (Fla. 2016)
      - "An inebriated condition does not affect the admissibility of a confession unless it rises to the level of mania."

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Local Example - Voluntary

- Suspect caught in the act of Burglary of a Dwelling (2 adjacent houses)
- Suspect was interviewed on video at the police station
- Suspect was obviously agitated, and appeared to be on some type of drugs
- Suspect discussed his current drug addictions and drug paraphernalia in his backpack
- However, suspect told the detective that he was "dope sick" – not currently on drugs, but going through withdrawals
- This issue arose YEARS after his initial jury trial and conviction, on a 3.850 motion hearing where the suspect (now defendant) was complaining about the job his lawyer did representing him.
- Court found that the confession was voluntary and lawyer was not ineffective for NOT filing a motion to suppress

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Local Example - Involuntary

- Prior example – suicide attempt by overdose, Baker Act, in hospital
- Court listened to the tape, and found that the suspect wasn't very coherent, and was "out of it"
  - At the beginning of the interview the suspect thought they had been in an accident
- Hospital doctor testified that the suspect was NOT in a "mania" state
- However, based on the totality of the circumstances, court found that the confession was involuntary, in addition to the Miranda violation since the suspect was "in custody."

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What happens if the confession gets suppressed?

- Miranda violation
  - Can't use it in State's case-in-chief
  - HOWEVER, if the confession is otherwise voluntary, the State can STILL use it as impeachment if the Defendant takes the stand and says something different
  - Bell v. State, 201 So.3d 1267 (Fla. 2d DCA 2016)
    - Statements obtained in violation of *Miranda* may be used by the State for impeachment purposes. But "[b]efore a suppressed statement can be used for impeachment purposes, the statement must be shown to have been made voluntarily." Citing older cases
- Involuntary confession
  - Can't use it at ALL
  - Even if the Defendant takes the stand, cannot confront the Defendant with that prior statement ☹

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Case Preparation Tips

- Tip #1
  - Record the interview!
    - 1) Preferred → audio & video record
      - Can see both the verbal & non-verbal responses
      - Jurors expect to see "the video"
      - Much easier for a court to find a confession voluntary if they can see the suspect, need to rely solely on the officer's credibility is reduced
    - 2) Audio record
      - If not practical to video record, audiotape the interview
      - Even interviews of witnesses
        - If they change their story later in the case, they can be confronted at trial with that statement (prior inconsistent statement, past recorded recollection)
    - 3) LABEL and separate the interviews so they can be easily found by the State Attorney's Office
      - Labels are especially helpful (interview of Defendant, interview of Betsy Smith, etc)
    - 4) If possible, have back-up recorders
    - 5) Do NOT, I repeat do NOT rely on body cameras! Interviews on body cameras are often hard to hear and more often hard to find in the case file

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Case Preparation Tips

- Tip #2
  - Report the Interview!
    - Include details as to why you believe it is a custodial or non-custodial interview
      - Details could include:
        - Location
        - Whether told they were free to go or not under arrest
        - Ability of suspect to leave (clear path, open door)
        - If Post-Miranda, what you told the defendant, what they said when they waived, any witnesses present
    - Even though the State / Defense may have a copy of the interview, a detailed report of what the suspect said during the interview is necessary
      - Points out the important parts
      - Time constraints on ASA's reviewing files for filing decisions, motions or trials
      - The report with the Defendant's statements can be shown to the court, without the court having to review the entire interview. Example: **Proof Evident / Presumption Great bond hearing**

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Top 10 Do's and Don'ts of Questioning a Suspect

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#1 – DO Narrate during an audio interview

- When there is no video, a court cannot "see" what is going on during the interview
- The best audio interviews I have come across, especially for non-custodial interviews, have the agent "narrating" all of their actions & the suspects actions.
- Examples:
  - "I have left the door open in the vehicle if you wish to leave"
  - "It was your decision to come outside your house to speak with me in private, right?"
  - "We haven't threatened you, coerced you, or done anything to make you speak with us, have we?"

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#2 – DON'T create fake evidence to show a suspect

- While it is allowable for an officer to use a bit of ruse or otherwise lie about what evidence they have (to a point – don't go overboard).
  - In *Conde v. State*, 860 So.2d 930, 952 (Fla.2003), we found the defendant's **confession** voluntary where a detective exaggerated the amount of **DNA evidence** against the defendant.
- It is NOT acceptable to create evidence that is false.
  - Example: Telling a suspect that they found DNA on the murder weapon vs. producing a fake DNA report and showing the "report" to the suspect
  - In **State v. Cayward**, 552 So.2d 971 (Fla. 2d DCA 1989), police fabricated laboratory reports from reputable agencies that indicated the defendant's semen was on the victim's underwear. The court found the police overstepped the line of permitted deception.

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#3 – DO read Miranda warnings to a person in jail or under a Baker Act

- Unless the situation is one where the statements are completely spontaneous, it is better to use caution when dealing with suspects in these locations.

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#4 – DON'T "wing it"

- Always read the Miranda warnings from a pre-printed card or form

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#5 – DO answer questions the Defendant has regarding the Miranda rights

- If the Defendant asks a direct question, give them a direct answer – even if you can't answer the question.
  - Example: "Well, what good is an attorney going to do?"
    - While this is NOT an invocation of the right to counsel, the officer still needs to address the question.
    - Almeida v. State, 737 So.2d 520 (Fla 1999)
      - "If at any point during custodial interrogation a suspect asks a clear question concerning his or her rights, the officer must stop the interview and make a good-faith effort to give a simple and straightforward answer."
- If the Defendant requests their lawyer, you must take steps to contact their lawyer or allow them to contact their lawyer prior to any further questioning. Or just cease questioning.

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#6 – DON'T rely on a "Body Cam" or In-Car video to record the questioning

- Body cam's fail
- Body cam footage doesn't get marked as "Evidence" and gets destroyed
- In-car video
  - The audio quality decreases the further you get away from your car
- When recording an interview / interrogation, always use a second recording device
- It is very difficult to FIND or watch an interview that is done via a body cam (with the exception of agencies that use a stationary body cam for police station interviews)
- Audio quality is also much better, typically, when using a digital recorder
- Back-ups are helpful!

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#7 – DO consider the suspect, including their current state

- Are they very intoxicated? Will it be better to interview them in a few hours after they have sobered up?
- Is this a situation where I should bring in an interpreter?
- Do I need to use a lower level vocabulary in speaking with the suspect?

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#8 – DON'T keep talking when a suspect unequivocally invokes their Miranda rights

- Clear invocations
  - "I want an attorney"
  - "No quiero declarar nada" (I don't want to declare anything)
    - Cuervo v. State, 967 So.2d 155 (Fla. 2007)
- If the rights are invoked, the officer must SCRUPULOUSLY honor that right and not ask any further questions
  - Officer good response – "OK, we will have the jail van pick you up, you can go back to your cell . . . "
  - Officer bad response – "are you sure? This is your one chance to speak with us, tell us your side of the story . . . "
- If the officer does not scrupulously honor the right to remain silent, any future re-initiation may not be valid.
  - Michigan v. Mosley, 423 U.S. 96 (1975)

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#9 – DO let the suspect know if an attorney wishes to speak with them

- State v. McAdams, 193 So.3d 824 (Fla. 2016)
  - Suspect, not under arrest, was being interviewed at the Sheriff's Office
  - Attorney for the suspect, retained by the suspect's parents, arrives at the Sheriff's Office after the interview commenced but prior to the confession.
  - Attorney was told that there was no way to contact the suspect while the interview was going forward.
  - Attorney asked that all questioning be stopped
  - Suspect did not invoke their right to counsel
  - "We hold that when a person is questioned in a location that is not open to the public, and an attorney retained on his or her behalf appears at the location, the Due Process Clause of the Florida Constitution requires that law enforcement notify the person with regard to the presence and purpose of the attorney, regardless of whether he or she is in custody."

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#10 – DON'T make promises

- Not OK
  - A confession made in return for a promise of release
    - Brockelbank v. State, 407 So.2d 368 (Fla. 4th DCA 1981)
      - Suspect assisted in return of stolen property in exchange for immediate release from jail and that no other charges would be filed immediately.
  - A promise not to prosecute other crimes
    - Samuel v. State, 898 So.2d 233 (Fla. 4th DCA 2005)
      - Officer's promise not to prosecute defendant for 15 charges, some of which were fictional, if he confessed to robberies he committed was coercive, and thus, defendant's confession was involuntary.

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#10 – DON'T make promises

- OK
  - A police officer agrees to make one's cooperation known to prosecuting authorities
    - Maqueira v. State, 588 So.2d 221 (Fla. 1991)
  - A police officer tells a suspect that it would be easier on him if he told the truth
    - Bush v. State, 461 So.2d 936 (Fla. 1984)
  - Merely "[e]ncouraging or requesting a person to tell the truth does not result in an involuntary confession."
    - McCloud v. State, 208 So.3d 668 (Fla. 2016)
  - A police officer reading from the Bible, on a Sunday, and telling the Defendant "the truth shall set you free."
    - McNamee v. State, 906 So.2d 1171 (Fla. 4th DCA 2005)

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Assistant State Attorney
Kathryn (Kathy) Speicher

State Attorney's Office
2725 Judge Fran Jamieson Way, Bldg D
Viera, FL 32940
(321) 617-7510 office
kspeicher@sa18.org (best)

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Prosecution of Child Abuse Cases

Jennifer Mench, Victim Advocate
Kathy Speicher, Assistant State Attorney

1

Introduction

- Kathy Speicher
  - Assistant State Attorney
  - State Attorney's Office
  - Prosecutor for 14.5 years
  - Prosecuted Child Abuse & Sex Cases for 6 years
  - Board Certified Criminal Trial Law
  - Currently prosecuting firearms cases and career offenders
  - kspeicher@sa18.org

2

Introduction

- Jennifer Mench
  - Victim Advocate
  - State Attorney's Office
  - Victim Advocate for 15 years
  - Worked in SAVS unit for 11.5 years
  - BSW (Bachelors in Social Work)
  - MA in Counseling
  - jmench@sa18.org

3

Typical Day Prosecuting Child Abuse cases

- An Assistant State Attorney's caseload will have cases in various stages of the criminal process
- State Attorney Investigation in the morning, followed by a deposition of a child victim later in the morning
- Hearing on a Child Victim Hearsay notice in the afternoon, which takes the entire afternoon
- Prosecutors & Victim Advocates work together and are typically present for each of these events
- We will take you through the criminal process from the beginning of a case to the end.

4

Assisting Victims and Families

- **Role of the Legal System**:
  - Goal is to protect society as whole, not just the abused child
  - Prosecutor decides what charges, if any are filed
  - Prosecutor decides how the case is conducted, and ultimately how it will be resolved
- Victim's Rights (Chapter 960, 2019 Florida State Statutes)
- Marsy's Law (right to enforcement of victim's rights, including right to speedy trial)
- Victims have the right to be notified and informed of any and all crucial proceedings
- Victims have the right to be present
- Victims have the right to give input regarding any plea offers, and have the right to give Victim Impact Statements
- Victims have the right to have an advocate present during discovery depositions, forensic exams, and testimony in court

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Victims Rights

- Right to be treated with dignity, respect, and sensitivity
- Right to be informed regarding arrest/arraignment of offender, bond hearings and conditions of release, pretrial proceedings, dismissal of charges, plea negotiations, trial, sentencing, appeals, probation hearings, release or escape of offender
- **Right to protection**: relocation assistance, injunctions, witness protection programs, police escorts
- **Right to apply for compensation**: medical and counseling expenses, lost wages, funeral expenses
- Right to restitution from the offender ("make victim whole")

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Role of Victim Advocate

- To provide information regarding the criminal justice process (including victim's legal rights and protections), and status of the case
- Provide emotional support, crisis intervention (emotional first aid)
- Assist victims with safety planning
- Assist with application for victim compensation
- Assist victims with finding shelter or transportation to court proceedings
- Provide referrals for other service needs (such as counseling, housing)
- Assist with victim impact statements to be submitted

7

Role of an Advocate (continued)

- Advocates support victims' decision making
- Advocates seek to maintain the highest level of confidentiality;
- Exceptions are if victim is threat to self or others, or having to report abuse of neglect of children/elderly (mandated reporters)
- Advocates do not tell victims what to do, nor can they provide legal advice.

8

Intake Process

- Case is received from law enforcement agency
  - Most police work has been completed
  - Child Protection Team (CPT) interview(s) have been completed
- Case is reviewed by Intake prosecutor
  - May interview victim
    - ASAs are considered law enforcement and can swear witnesses
- Prosecutors have several options
  - File same charges
  - File different charges
  - Not file any charges

9

Administrative Order 91-76-Ci

- Local Order
- Limits the number of times that victims of child abuse and sex abuse cases, who are under 16, can be interviewed
- Forces law enforcement and DCF to work together to coordinate interviews and investigations of child abuse cases
- Prosecutors can "interview" a victim
  - Before filing formal charges
  - After filing formal charges
  - When the case is set for jury trial

10

Administrative Order 91-76-Ci

- Only one discovery deposition of the victim
- "Interviews and depositions shall be conducted in a setting and manner designed to minimize the traumatic effect of the interview on the child"

11

State Attorney Investigation (SAI)

- Once charges are filed, victims can be brought in to explain the process and answer any questions they may have
- Typically the victim & the victim's parent / family member(s) are brought in
  - Difficult, sometimes, when the defendant is a parent, to figure out who currently is in charge of the child victim
- Explain current posture of the case & future of the case
- Obtain any plea input from the victim or family
- A chance to build rapport

12

Child Victims

- Most offenders are known to the child victim—often, the abusers are family members or someone who is considered "part of the family."
- When children are abused by adults who are supposed to protect them from harm, their ability to trust and relay on adults may be shattered
- Knowing that the abuser is liked, loved, and/or well known in the community can make it more difficult for children to tell others about the abuse **
- It can take victims of intrafamilial abuse weeks, months, or even years to disclose, and even longer to reveal all the details ***

13

Child Victims (cont.)

- Victims may suffer from self doubt, self blame, fear of the abuser, and distress over what their disclosure has done to the family
- Recanting is common and doesn't mean the child is lying—child may feel pressured to recant because of how it is affecting the family or due to lack of family support—and in a desperate attempt to make everything better, they may change their story or deny abuse occurred
- Family members may find it hard to believe the offender could do such a thing, and take sides over who is telling the truth
- Family members struggle with divided loyalties between victim/offender

14

Non-Offending Parents

- Greatest challenge for the parent is dealing with their own reactions to their child's disclosure
- Dealing with family members who don't believe the abuse occurred or maintain relationship with the abuser
- Economic hardship if financially dependent on the abuser
- Possible loss of friends when they learn partner is the abuser
- Making sense of conflicting advice from friends, family, religious leaders, legal authorities—expected to "forgive the offender" or end involvement with the abuser
- He/She is the single most important resource the child has after experiencing abuse

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Non-Offending Parents (cont.)

- Parent has to choose who to believe, and weigh consequences of believing one over the other
- Parent may have been a victim of abuse in his/her past
- May be easier for parent to believe young child over teen
- May wonder why it took child so long to tell, could child have resisted, or was he/she responsible in some way?*
- May feel confusion, anger, guilt if child disclosed to someone else
- Parent may feel betrayed, as if partner and child were "cheating"*

16

Non-Offending Parents (cont.)

- Children who disclosed abuse may face reactions from being told to keep quiet, to "forget," and be punished for "telling lies."
- In addition to suffering from the abuse itself, children may grow up feeling abandoned by the people who should have protected them
- Ask self "what would it take for me to believe my child, not be angry at my child, and not feel betrayed by my child"
- Believing child means facing the fact that loved one betrayed, lied, and used you and your child
- Letting go of anger means redirecting anger away from child and to abuser
- Letting go of feelings of betrayal means recognizing the real source of the betrayal—the offender. Parent will need to accept that much of what was believed about this person was not true

17

Depositions

- Depositions are a chance for the defense attorney to ask questions of the victim in preparation for trial
  - A victim does NOT have to speak with the defense attorney, unless they are subpoenaed for a deposition or trial (However, if they wish to speak with a defense attorney, they may)
- Testimony at a deposition is subject to perjury
  - Persons usually present, besides victim, include:
    - Assistant State Attorney
    - Defense Attorney
    - Court reporter
    - Victim Advocate
  - NOT present → the Defendant

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Depositions

- If the victim is under 18 years of age:
  - The deposition MUST be videotaped
  - Florida Rule of Criminal Procedure 3.220(h)(4)
- If the victim is not local
  - The attorneys have to travel to the victim's county of residence
- Rape Shield Laws – Fl. Stat. s. 794.022
  - Victim's testimony need not be corroborated
  - Generally, specific instances of prior consensual activity between the victim and any person other than the offender may not be admitted into evidence

19

Lewd & Lascivious charges

- Jury Instructions
  - **Neither victim's lack of chastity nor victim's consent is a defense to the crime charged.**
  - **The defendant's ignorance of victim's age, victim's misrepresentation of his or her age, or the defendant's bona fide belief of victim's age is not a defense to the crime charged.**

20

Child Victim Hearsay

- Normally, what a person says out-of-court is inadmissible at trial
  - UNLESS it meets an exception
- EXCEPTION: Child Victim Hearsay (Fl. Stat. s. 90.803(23))
  - State files a written notice
  - The Child Victim makes a qualifying statement
    - Victim is 16 years of age or less
    - Statement is describing the act (or circumstances surrounding)
    - The statement is trustworthy
  - Can be used in both Child Abuse and Sex Offense cases

21

Child Victim Hearsay

- Court holds an evidentiary hearing, usually before trial
- Main issue: trustworthiness of the disclosure by the child victim
- State will call the witness or witnesses to whom the victim first disclosed the abuse. The witnesses will testify to:
  - What exactly the victim said, and
  - Circumstances surrounding the disclosure

22

Child Victim Hearsay

- The victim may have disclosed the abuse to multiple persons over the course of the initial disclosure.
- The State will call each witness the victim made a disclosure to, assuming the circumstances are trustworthy.
- Example of a child victim hearsay disclosure at school:
  - Victim disclosed to a teacher, guidance professional, principal, school resource officer, detective and CPT interviewer (8 persons in total)

23

Child Victim Hearsay

- CPT Interview
  - Audio / video
  - See child and hear a detailed description of the abuse
  - The CPT interviewer is trained in how to interview a child
    - How to qualify a child
    - Asks open-ended questions that do not suggest an answer
  - Typically law enforcement & DCF are watching the interview as it happens, so they can have the interviewer ask additional questions, if necessary
- If the court allows the Child Victim Hearsay, the State can play the CPT interview of the child for the jury

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Child Victim Hearsay

- Some factors the judge looks for to consider trustworthiness:
  - Mental and physical age and maturity of child
  - Nature and duration of the abuse or offense
  - Relationship of the child to the offender
  - The statement's spontaneity
  - Whether the statement was made at the first available opportunity following the alleged incident
  - Whether the statement was elicited in response to questions from adults
  - Whether the statement consisted of a child-like description of the act
  - The ability of the child to distinguish between reality and fantasy
  - The possibility of any improper influence on the child by participants involved in a domestic dispute

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Child Victim Hearsay

- The Judge will issue a written ruling letting the parties know whether or not the State can enter the child victim hearsay into evidence.
- Normally, the victim doesn't testify at this hearing since it is the credibility of the disclosure, not necessarily the credibility of the child at issue
- However, oftentimes a victim will disclose the abuse to a family member and the family member will need to testify at the hearing.

26

Child Victim Hearsay

- Victim testifying
  - In most cases, when Child Victim Hearsay is admitted into evidence, the victim also testifies at the trial.
- Victim not testifying
  - In some circumstances, the State can enter the Child Victim Hearsay even if the victim is not available to testify. Examples of unavailability include:
    - Child not competent to testify
    - Child is suicidal at a behavioral facility
  - In these situations, it is important to examine disclosures made to non-law enforcement persons, such as:
    - School teacher, parent, or nurse

27

Williams Rule Evidence

- *Williams* Rules Evidence is evidence that the defendant committed a different crime or bad act.
- In certain cases, it can help the State prove a case.
- It is used in cases where:
  - The defendant has additional victims
  - The crimes happened under similar circumstances
- Similar to Child Victim Hearsay, a hearing is held prior to trial or prior to the introduction of the evidence.
  - The State must also give the Defense notice (10 days prior to trial) of the intention to use *Williams* rule evidence.

28

Williams Rule Evidence

- *Williams* Rule evidence typically involves the testimony of OTHER victims
  - These other victims may be deposed, as well
- Example: A grandfather abuses 3 of his granddaughters
  - Abuse occurred in the same way, but at different times
  - The victims did not know until years later that they each had been victimized
  - Due to the length of time that has passed (statute of limitations) and the ages of the victims, the State can only prosecute the case involving the youngest granddaughter
  - The State can potentially still use the testimony of the other 2 victims to prove that the defendant committed the crime against the youngest granddaughter

29

Other Pre-Trial Litigation

- Other pre-trial litigation may not directly involve the victim, but it has an impact on the case
- Examples:
  - Motion to Sever Offenses → defendant wishes to separate the contact offenses from the photographs & videos found of the victim
    - If granted, the victim would have to go through two separate trials
  - Motion to Suppress Confession → defendant wishes to have the court toss their confession of the acts, to not let the jury hear their confession
    - If granted, the case is weaker and the likelihood of success at trial goes down

30

Plea Negotiations v. Marsy's law

- Marsy's Law (and prior laws) bestowed certain rights to victims of a crime
  - Right to be heard
  - Right to give input into the case
- Ultimately, however, all final plea offers are up to the State
  - The State can make a lower (or higher) plea offer than the victim likes
  - The State has to balance the benefits of a plea vs. uncertainty of a jury trial.

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Plea Negotiations v. Marsy's law

- Plea considerations:
  - If a jury trial, the victim likely must testify and be cross-examined
    - How will that impact the victim?
    - How will they hold up on cross-examination?
  - Jury trials are a lengthy process
    - If a defendant accepts a plea, it is possible the victim will not have to relive the experience through a deposition or testimony at trial
  - If the case proceeds to jury trial, a mistrial could happen
    - The State (and victim) would have to go through the process again
  - Jury could find the Defendant Not Guilty
    - How will the victim react?

32

Going to Court

- **Fears**
  - Loss of Privacy
  - Fear of Retaliation
  - Financial worries
  - Missing school or other important events
- **Realities**
  - Courtroom is open to public; however, media cannot identify victim or show features; ASA can request to clear courtroom of non-essential or parties to the case
  - No contact order, notify school/daycare, injunction, report any threats
  - Victim compensation assistance/resources; assure child that he/she is not to blame for situation
  - Coordinate with school regarding schedule/testing/homework; school excuses

33

Coping with Stress of Trial

- Maintain normal routines—don't let life revolve around the case or the abuse
- Set normal expectations
- Expect the unexpected
- Avoid information overload
- Build supports outside the family
- Take care of self(parent)
- Courtroom Orientation, trial prep
- Plan for life after verdict, regardless of outcome

34

Jury Trial

- Jury Selection → length depends on type of case
  - Child Abuse – typically not long
  - Sex Abuse case – can take a few days. Jurors can be reticent based on:
    - Hardship (length of time the case may take)
    - Nature of the case
  - Based on those two factors, we typically lose half of our jury pool right at the start
- Opening Statements
  - Not nearly as riveting as Law & Order: SVU

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Jury Trial

- Victim Testimony
  - The victim is typically the main witness
- Young child → Competency
  - For a child to testify, the court must deem them "competent"
    - Understand the difference between a truth and a lie
    - Understand it is important to tell the truth
    - Understand they could get in trouble for not telling the truth
  - There is no age minimum or limit to testify, it all depends on the intelligence of the child.
  - Judges keep a watchful eye to make sure children are treated fairly

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Jury Trial

- Victim Cross-Examination
  - Defense Attorneys can ask victims questions
- Trial Preparation
  - Review prior statements
  - Review depositions
  - Review evidence (photos, text messages, etc)
- Closing Statements
- Verdict
  - Victim, family & friends can be present
  - Those present must remain calm

37

Victim Support & Rights During a Trial

- General rule → The victim and certain family members have the right to be present during the jury trial, unless it will infringe on the rights of the Defendant
- Example: A father wanted to attend the jury trial, but was also listed as a witness.
  - The Defendant asked to keep him out of the courtroom during the entire trial and the judge agreed
  - A family member NOT listed as a witness was able to attend in his place

38

Sentencing

- Victims again have the rights:
  - To be present
  - To be heard
- Victim Impact Statement
  - Victims can tell the court how this crime has impacted them & their families
  - Victims can address the court, even if it is an agreed upon plea

39

Appeals

- Jury Trial appeal
  - If a case proceeds to a jury trial and the defendant is convicted, the defendant is likely to appeal.
  - This is a lengthy process. If mistakes were made during the trial, it is possible that the State would have to try the case again
- 3.850 Motion
  - If the Defendant's sentence & conviction are affirmed, the Defendant can file a motion saying they did not receive a fair trial because their counsel was ineffective.
  - Sometimes a hearing is held. If denied, the Defendant can once again appeal
- Frivolous Motions
  - Sometimes defendants file motions claiming victims have recanted (when they have not) or other motions
  - This can "reopen the wound" each time a defendant does so, if the victim wishes to be contacted.

40

Supporting Victims' Parent/Caregiver

- Listen to what he/she says, helping them to process their own feelings so they can give full attention to victim when time comes
- Allow them to react to the crisis—provide the safe place to discuss concerns
- Let them know it's OK not to have all the answers—being non-judgemental, listening, and just being there can be a strong source of support
- Provide clear and accurate information about common trauma responses, healing process, and let them know that the child is **primary "client" and their needs and decisions will be honored**.
- Provide information about the criminal justice process, and allow input and victim impact on behalf of the child
- Provide referrals and resources to the parent

41

Questions?

- Kathy Speicher, Assistant State Attorney
  - kspeicher@sa18.org
- Jennifer Mench, Victim Advocate
  - jmench@sa18.org

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TAB 38

Higher Education Course Syllabi

CRIMINAL LAW – CJL 2401
Fall 2016 Professor Kathryn Speicher
email: speicherk@easternflorida.edu
Advisement hours: by appointment

PLAN YOUR PROGRAM OF STUDY ACCORDINGLY
NOT ALL CLASSES ARE OFFERED EVERY SEMESTER

Text: Criminal Law, Seventh Edition by Scheb **ISBN: 978-1-285-45903-5, ISBN-13: 978-1-285-45922-6**

Course Description: This class will examine the theory and purpose of criminal law procedures with an emphasis on the role of the United States Supreme Court and the United States' Constitution. The F index crimes and legal defenses are also examined.

Course Competencies: The student will be able to break down various crimes into their individual elements, as well as identify available defenses.

Attendance / Participation - 15% (10 points per class, 150 total)
Final Exam - 30% - 300 points on exam, 300 total
Exams - 30% (10% per exam, 100 points per exam, 300 total)
Homework - 25% (10 assignments, 25 points each, 250 total
Total = 1000 points

A = 900 points or more
B = 800 to 899 points
C = 700 to 799 points
D = 600 to 699 points
F = 599 points or less

Attendance / Participation / Missed Exams: You must be physically present AND participate in class to receive the 10 daily attendance/participation points. The instructor reserves the right to withhold attendance / participation points if the student is texting, talking on a cell phone or anything else unrelated to class activities. Additionally, it is expected that you will not leave class early, except upon notification to the professor prior to the start of class. You must contact the instructor via email, with an approved reason, prior to missing an exam. Failure to do so may result in your exclusion for taking the exam.

Take a position: When this is assigned, please read the question and ponder your thoughts on the issue. Be prepared to discuss this problem in class and participate verbally. You do not need to hand in any written work, but writing down your thoughts may help in your verbal participation.

Extra Credit Opportunities: Other opportunities at the discretion of the instructor.
1) **Handwriting Chapter Key Terms definitions** PRIOR to the test where those Chapter key terms are discussed.
*5 points per Chapter turned in at the date of the exam. This does not apply to the final exam.
*EX: Turn in handwritten key terms definitions for Chapters 1-4 on the date of Exam 1 and receive 20 extra points on that exam.
2) **Chapter Quizzes:** Instructor will give a "pop quiz" consisting of 3 questions about the chapter readings as soon as class begins.
*3 questions, 2 points per correct answer
*Ex: You are supposed to read Chapter 2, PRIOR to 8/23/16. At 6pm on 8/23/16 the Instructor will administer a 3 question "pop quiz" on Chapter 2, **before** it is discussed.

Class Schedule (SUBJECT TO CHANGE, CHECK CANVAS FOR UPDATES OR CHANGES)

8/16/16 - *Introduction to Criminal Law, Chapter 1: Fundamentals of Criminal Law*
*Homework: Chapter 1 questions #2 and 3 (due 8/23/16)

8/23/16 - *Chapter 2: Organization of the Criminal Justice System*
*Homework: Chapter 2 questions #3, 6 and 8 (due 8/30/16)

8/30/16 - *Chapter 3: Constitutional Limitations on the Prohibition of Criminal Conduct*
*Homework: Chapter 3 questions #1 and 6 (due 9/6/16)
*Take a position: Problem #2

9/06/16 - *Chapter 4: Elements of Crimes and Parties to Crimes*
*Homework: Chapter 4 questions #1 and 9 (due 9/13/16)

9/13/16 - TEST 1

9/20/16 - *Chapter 5: Inchoate Offenses*
*Homework: Chapter 5 questions #1 and 5 (due 9/27/16)
*Take a position: Problem #5

09/27/16 - *Chapter 6: Homicidal Offenses, Chapter 7: Other Offenses Against Persons*

10/04/16 – *Chapter 7: Other Offenses Against Persons(continued) Chapter 8: Property Crimes*
*Homework: Chapter 6 question #4 (due 10/11/16)
*Homework: Chapter 7 question #1 (due 10/11/16)

10/11/16 - *Chapter 8: Property Crimes(continued)*
*Homework: Chapter 8 questions #2 and 3 (due 10/18/16)
*Take a position: Problem #1

10/18/16 – TEST 2

10/25/16 - *Chapter 10: Vice Crimes*
*Homework: Chapter 10 questions #3 and 8 (due 11/01/16)

11/01/16 - *Chapter 10: Vice Crimes (continued)*
*Homework: Chapter 10 questions #10 and 15 (due 11/08/16)
*Take a position: Chapter 10, Problem #4

11/08/16 - *Chapter 12: Offenses against Public Order, Safety, and National Security*

11/15/16 - *Chapter 13: Offenses against Justice and Public Administration*
*Homework: Chapter 12 question #7 (due 11/22/16)
*Homework: Chapter 13 question #10 (due 11/22/16)

11/22/16 – *Chapter 14: Criminal Responsibility and Defenses*
*Homework: Chapter 14 questions #5 and 7 (due 11/29/16)
*Take a position: Problem #4

11/29/16 - TEST 3 & Final Exam Review

12/06/16 -FINAL EXAM

Attendance policy: **ANY STUDENT WHO MISSES THREE CLASSES IN A ROW WILL BE CONSIDERED WITHDRAWN. ANY STUDENT WHO MISSES FIVE CLASSES OR MORE WILL NOT BE ALLOWED TO SIT FOR THE EXAM.**

*******OCTOBER 20th is the last day to withdraw from class and receive a grade of W*******

Students with documented disabilities who desire to receive services including special testing conditions, or who need specific accommodations, should register with the Office for Students with Disabilities. There are no disadvantages in registering, and that office keeps everything confidential. It does not get written on one's transcript or diploma that services were ever received. Services may not be received without this registration

CRIMINAL PROCEDURE – CJL 1400
Spring 2018 Professor Kathryn Speicher
email: speicherk@easternflorida.edu
Advisement hours: by appointment

PLAN YOUR PROGRAM OF STUDY ACCORDINGLY
NOT ALL CLASSES ARE OFFERED EVERY SEMESTER

Text: Criminal Procedure, Ninth Edition by Joel Samaha; **ISBN:** 9781285457871

Course Description: Thorough study of rules governing admissibility of evidence focusing on the law of arrest, search and seizure and other due process requirements. Constitutional law is also examined as it relates to courtroom procedure.

Course Competencies: Be able to identify the application of different constitutional amendments to the criminal justice process as well as define legal terms relating to criminal justice

Attendance / Participation - 20% (Everyone starts with 5 points, 15 point per class, 200 total)
Exams - 30% (100 points per exam, 300 points total)
Courtroom Practicum – 20% (200 points total)
Final Exam - 30% - (300 points on exam, 300 total)
Total = 1000 points

A = 900 points or more
B = 800 to 899 points
C = 700 to 799 points
D = 600 to 699 points
F = 599 points or less

Attendance / Participation: You must be physically present AND participate in class to receive the 15 daily attendance/participation points. Participation INCLUDES your assigned role for the mock trial. The instructor reserves the right to withhold attendance / participation points if the student is texting, talking on a cell phone or anything else unrelated to class activities.

Courtroom Practicum: At some point during this semester, at your leisure and convenience, you are required to watch a LIVE criminal courtroom proceeding. You will be provided a form to fill out as you watch and research one of the following proceedings: jury trial, bench trial, suppression motion, sentencing or other qualifying proceeding. In addition to this form, you are required to write a 2 page paper (500 words) discussing what you saw and how it relates to what we have studied this semester. **If you work during the day, or are unable to attend a court proceeding, please see the Professor at least one (1) month prior to the end of the semester! Also, you must watch a CRIMINAL proceeding, a civil proceeding will not be accepted, nor will a hearing involving your professor.**

Extra Credit Opportunities:***Additional opportunities at discretion of professor***
1) **Handwriting Chapter Key Terms definitions** PRIOR to the test where those Chapter key terms are discussed.
*5 points per Chapter turned in at the date of the exam. This does not apply to the final exam.
*EX: Turn in handwritten key terms definitions for Chapters 1-4 on the date of Exam 1 and receive 20 extra points on that exam; only chapters covered will be accepted.
2) **Duplicate Courtroom Practicum:** Complete the Courtroom Practicum exercise for an additional, qualifying proceeding and receive up to 50 points.

Class Schedule (Please check CANVAS for any changes to the schedule)

1/9/18 - *Chapter 1: U.S. Criminal Procedure: A Road Map and Travel Guide; Chapter 2: Criminal Procedure and the Constitution*

1/16/18 - *Chapter 3: The Definition of Searches and Seizures*

1/23/18 - *Chapter 4: Stop and Frisk*

1/30/18 - TEST 1

2/06/18 - *Chapter 5: Seizure of Persons: Arrest*

2/13/18 - *Chapter 6: Searches for Evidence; Chapter 7: "Special-Needs" Searches*

2/20/18 – *Chapter 8: Self-Incrimination*

2/27/18 - *Chapter 9: Identification Procedures*

3/06/18 - TEST 2

3/13/18 – *Chapter 10: Remedies for Constitutional Violations I: The Exclusionary Rule; Chapter 11: Constitutional Violations II: Other Remedies against Official Misconduct; Chapter 12: Court Proceedings I: Before Trial*

3/20/18 – Mock Trial Prep, including questions (in class or on your own)

3/27/18 – *SPRING BREAK (NO CLASS)*

4/03/18 – *Chapter 13: Court Proceedings II: Trial and Conviction*

4/10/18 – MOCK TRIAL (MANDATORY ATTENDANCE)

4/17/18 – *Chapter 14: After Conviction: Sentencing, Appeals and Habeas Corpus*

4/24/18 – TEST 3 & FINAL EXAM REVIEW → **COURTROOM PRACTICUM DUE AT 6PM!**

5/01/18 – FINAL EXAM

Attendance policy: **ANY STUDENT WHO MISSES THREE CLASSES IN A ROW WILL BE CONSIDERED WITHDRAWN. ANY STUDENT WHO MISSES FIVE CLASSES OR MORE WILL NOT BE ALLOWED TO SIT FOR THE EXAM.**

*******March 15th, 2018 is the last day to withdraw from class and receive a grade of W*******

Students with documented disabilities who desire to receive services including special testing conditions, or who need specific accommodations, should register with the Office for Students with Disabilities. There are no disadvantages in registering, and that office keeps everything confidential. It does not get written on one's transcript or diploma that services were ever received. Services may not be received without this registration

TAB 71

Appellate Opinions (applicant handled as the trial Assistant State Attorney)

266 So.3d 873
District Court of Appeal of Florida, Fifth District.

STATE of Florida, Appellant,
v.
Mark Leroy PHILLIPS, Sr., Appellee.

Case No. 5D17-4041
|
Opinion filed March 22, 2019

Synopsis
Background: Defendant was charged with violation of the probation imposed following his conviction for sexual offenses against a child based on his alleged failure to report two online identifiers. Defendant filed a motion to suppress evidence found in the warrantless search of his cell phones. The Circuit Court, Brevard County, Nancy Maloney, J. granted order of suppression. The State appealed.

The District Court of Appeal, Eisnaugle, J., held that legitimate governmental interest outweighed defendant's privacy interest in cell phone data.

Reversed and remanded; question certified.

***874** Appeal from the Circuit Court for Brevard County, Nancy Maloney, Judge.

Attorneys and Law Firms

Ashley Moody, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellant.

James S. Purdy, Public Defender, and George D. E. Burden, Assistant Public Defender, Daytona Beach, for Appellee.

Opinion

EISNAUGLE, J.

The State of Florida appeals an order suppressing evidence obtained from a probationary search of Appellee's, Mark Leroy Phillips, Sr., cell phones, arguing that the search was reasonable pursuant to the Fourth Amendment. We agree and conclude that the search was reasonable because the government's interest in supervising Appellee while he was on probation for sex offenses against a child outweighed Appellee's privacy interest in his cell phone data. We therefore reverse the order of suppression.

The Probationary Search in this Case

In 1994, Appellee pled guilty to attempted sexual battery on a child, lewd and lascivious conduct upon a child, and sexual activity with a child by a person in familial or custodial authority. He was sentenced to ten years in prison followed by fifteen years of probation. The express terms of Appellee's probation included:

> The Court retains custody over your person and authorizes any officer to search you at any time and search all vehicles and premises concerning which you have legal standing to give consent to search.
>
> No contact with minor children without supervision of [an] adult.
>
> You will promptly and truthfully answer all inquiries directed to you by the Court or Community Control/Probation Officer and allow the Officer to visit in your home, at your employment site or elsewhere ....

Although Appellee's terms of probation were expansive, they did not include an express authorization to search Appellee's cell phone data.[1]

After his release from prison, and while he was registered as a sexual offender, Appellee's probation officer visited his home and conducted a forensic download of his cell phones. The officer did not have a warrant to search electronic devices, nor did she have reasonable suspicion to believe Appellee had violated his probation or otherwise committed any crime.

A search of the cell phones' data revealed two online identifiers that Appellee had allegedly failed to report in violation of section 943.0435(4)(e), Florida Statutes (2017). As a result, the State charged Appellee with violating his probation and instituted ***875** a new criminal proceeding charging Appellee with failure of a sex offender to report. The State later dropped the new charges and proceeded only on the violation of probation.

Appellee filed a motion to suppress evidence of the online identifiers, arguing *inter alia*, that the probationary search was unreasonable because he had a high privacy interest in the contents of his cell phones, the express conditions of his probation order did not authorize a search of any cell phone, and the search was not supported by reasonable suspicion. The trial court granted the motion, and this appeal follows.

The Fourth Amendment and Warrantless Searches

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Amend. IV, U.S. Const.[2] "As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is reasonableness.' " *Riley v. California*, 573 U.S. 373, 381–82, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006)). Therefore, courts generally employ a balancing test to determine the reasonableness of a warrantless search "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118–19, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999)).[3]

Under the conformity clause of Florida's Constitution, Florida courts are bound by the Fourth Amendment jurisprudence of the United States Supreme Court. *Soca v. State*, 673 So.2d 24, 27 (Fla. 1996). "However, when the United States Supreme Court has not previously addressed a particular search and seizure issue which comes before us for review, we will look to our own precedent for guidance." *Id.* (citations omitted).

***876** While we have identified no Florida or United States Supreme Court case deciding the reasonableness of a suspicionless probationary search of cell phone data, we find that the Florida Supreme Court's analysis in *Grubbs v. State*, 373 So.2d 905 (Fla. 1979), and the United States Supreme Court's decisions in *Knights* and *Riley*, guide our analysis. These cases together establish that (1) a probationer has a substantially diminished expectation of privacy, and (2) there is a heightened privacy interest in a person's cell phone data.

A Probationer's Diminished Privacy Interest

In *Grubbs*, our supreme court held that a warrantless search of a probationer's person and residence, for use in probationary proceedings, is reasonable even where there is no express search condition in the order of probation. 373 So.2d at 907, 909–10.[4] In so doing, the court recognized a probationer's diminished privacy interests, stating that "the probationer is entitled to some but not all due process rights" and that a probationer's protection under the Fourth Amendment is "qualified." *Id.* at 907.

On the other hand, the court reasoned that the government has a significant interest in a probationary search. The court recognized that a probationer is necessarily under the supervision and control of the State, and that Florida law "inherently includes the duty of the probation supervisor to properly supervise the individual on probation to ensure compliance with the probation order." *Id.* at 908. According to the court, "it would be unreasonable to require a probation supervisor to supervise an individual on probation in the absence of such authority." *Id.* Importantly, the *Grubbs* court expressly declined to extend the use of evidence discovered during a warrantless probationary search to new criminal proceedings. *Id.* at 910.

In *Knights*, the United States Supreme Court confirmed that a probationer has a diminished privacy interest—even where evidence from a search conducted by law enforcement officers is used in new criminal proceedings. In that case, a detective searched the probationer's apartment after obtaining reasonable suspicion to believe that the probationer was guilty of vandalizing a power company's facilities. 534 U.S. at 115, 122 S.Ct. 587. The district court granted the probationer's motion to suppress the incriminating evidence found during the search, and the circuit court of appeals affirmed. *Id.* at 116, 122 S.Ct. 587.

The United States Supreme Court reversed, however, holding that "the warrantless search of [the probationer], supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." *Id.* at 122, 122 S.Ct. 587. In reaching its conclusion, the Court observed that "[i]nherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled." *Id.* at 119, 122 S.Ct. 587 (citation and internal marks omitted).

On the other side of the balance, the Court focused on the government's interest in "apprehending violators of the criminal law" and reasoned that the government's interest in "protecting potential victims ... justifi[ed] focus on

probationers in a way that it does not on the ordinary citizen." *Id.* at 121, 122 S.Ct. 587.

The Heightened Privacy Interest in Cell Phone Data

In *Riley*, the United States Supreme Court recognized that cell phone data carries with it a heightened privacy interest. ***877** 573 U.S. at 393–97, 134 S.Ct. 2473. In that opinion, the Court reviewed two cases in which officers searched a cell phone without a warrant incident to arrest. *Id.* at 378–82, 134 S.Ct. 2473. In both cases, the search of the cell phone resulted in the discovery of evidence that implicated the defendants in other crimes, and both defendants moved to suppress the evidence discovered as a result of the searches. *Id.* The motions were denied. *Id.* at 379–81, 134 S.Ct. 2473.

On review, the Court concluded that the warrantless search of a cell phone incident to arrest is unreasonable. *Id.* at 401, 134 S.Ct. 2473.[5] In so doing, the Court observed that the government's interests supporting a search incident to arrest—avoiding harm to officers and destruction of evidence—are not implicated by cell phone data. *Id.* at 387–92, 134 S.Ct. 2473. Specifically, the Court noted that "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." *Id.* at 387, 134 S.Ct. 2473. Likewise, "once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone." *Id.* at 388, 134 S.Ct. 2473.

On the other hand, the Court reasoned that the defendants had an especially strong privacy interest in cell phone data because "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at 393, 134 S.Ct. 2473. According to the Court, "[t]he sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet." *Id.* at 394, 134 S.Ct. 2473.

Moreover, a cell phone's internet "search and browsing history ... could reveal an individual's private interests or concerns," and its history of location information could "reconstruct someone's specific movements down to the minute." *Id.* at 395–96, 134 S.Ct. 2473. The Court observed that the search of an internet enabled cell phone could reach beyond the data stored on the phone and could "access data located elsewhere, at the tap of a screen." *Id.* at 397, 134 S.Ct. 2473. In sum, the Court concluded that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house" because a cell phone "contains a broad array of private information never found in a home in any form." *Id.* at 396–97, 134 S.Ct. 2473.

The Totality of the Circumstances in this Case

Having considered the diminished privacy interest of a probationer and the heightened interest in cell phone data generally, we now turn to the balancing analysis in this case. We start our analysis from the premise that our supreme court has already decided that the search of a probationer's residence, even without an express search condition or individual suspicion, is reasonable where the results of the search are only used in probation proceedings.[6] *Grubbs*, 373 So.2d at 907, 909–10.

***878** That said, we are mindful that Appellee's interest in his cell phone is also high and that the privacy interests implicated by the search of a cell phone were not considered in *Grubbs* or *Knights*. In fact, given *Riley*'s statement that "a cell phone search would typically expose to the government far more than the most exhaustive search of a house," Appellee's interest is likely greater in his cell phone data than in his home.

Likewise, *Grubbs* did not consider the government's interest in supervising a sex offender on probation for offenses against a child. Therefore, our task is to place these unique considerations on the scales already prepared for us in *Grubbs*.

Appellee's Interest in his Cell Phone Data

We conclude that although a cell phone likely carries with it a greater privacy interest than even one's residence, it does not tip the scales much in Appellee's favor. Indeed, we observe that long before the advent of cell phones, a person's privacy interest in his or her residence was of central importance. *Riley* seems to acknowledge as much by its reference to Judge Learned Hand's statement that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." 573 U.S. at 396, 134 S.Ct. 2473 (citation omitted). While a cell phone may contain information that was previously

unavailable even in one's home, in our view, a cell phone's data does not wholly overwhelm the privacy interest a person historically held in his or her residence.

Appellee's Underlying Offenses against a Child

The government's legitimate interest in searching a probationer's cell phone data is critical in this digital age, at least where the underlying offense is for sexual abuse of a minor. Where a child predator once searched for victims in person, the internet offers a much more effective, efficient, and dangerous tool for identifying minor victims.

Thus, we conclude that the seriousness of Appellee's underlying offenses against a child, combined with the new opportunities to find child victims presented by today's technology, drastically increased the government's interest in conducting a probationary search of Appellee's cell phone data. *Compare* *United States v. King*, 736 F.3d 805, 810 (9th Cir. 2013) (search reasonable where underlying offense was violent), *with* *United States v. Lara*, 815 F.3d 605, 610–14 (9th Cir. 2016) (search unreasonable where underlying offense not "serious and intimate"). In this context, as in *Grubbs*, we find it would be unreasonable to require a probation supervisor to supervise an individual on probation for sex offenses against a child in the absence of authority to search the probationer's cell phone. *Cf.* *Grubbs*, 373 So.2d at 908.

Considering the totality of the circumstances and balancing the interests on both sides, we hold that the suspicionless search of Appellee's cell phone data for use in probation proceedings was reasonable and did not violate the Fourth Amendment.

***879** We also certify the following question of great public importance to our supreme court:

> DOES THE SEARCH OF A PROBATIONER'S CELL PHONE DATA BY A PROBATION OFFICER VIOLATE THE FOURTH AMENDMENT WHERE THERE WAS NO INDIVIDUALIZED SUSPICION FOR THE SEARCH AND THE PROBATIONARY SEARCH CONDITIONS, ALTHOUGH BROAD, DID NOT EXPRESSLY AUTHORIZE A SEARCH OF CELL PHONE DATA, BUT THE PROBATIONER IS A SEX OFFENDER, HIS UNDERLYING OFFENSES ARE FOR SEXUAL ABUSE OF A MINOR, AND THE RESULTS OF THE SEARCH ARE ONLY USED IN VIOLATION OF PROBATION PROCEEDINGS?

REVERSED and REMANDED for further proceedings; QUESTION CERTIFIED.

EVANDER, C.J., and LAMBERT, J., concur.

All Citations

266 So.3d 873, 44 Fla. L. Weekly D780

Conclusion

Footnotes

1 We note that cell phones were not internet enabled at the time the trial court initially rendered the terms of Appellee's probation.

2 Article I, Section 12, of the Florida Constitution similarly enshrines "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means." Art. I, § 12, Fla. Const.

3 A warrantless search is also reasonable "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (Blackmun, J., concurring in judgment)). This "special needs" analysis presents a separate test pursuant to which a search may be deemed reasonable. *See* *United States v. Payne*, 588 F. App'x 427, 431 (6th Cir. 2014) ("If a warrantless search is reasonable under either *Knights* or *Griffin*, it need not pass muster under the other."); *United States v. Herndon*, 501 F.3d 683, 688 (6th Cir. 2007) ("*Grif[f]in* and *Knights* represent two distinct analytical approaches under which a warrantless probationer search may be excused."); *United States v. Freeman*, 479 F.3d 743, 746 (10th Cir. 2007) ("The Supreme Court has created two exceptions to the Fourth Amendment's warrant requirement

in the context of parolee searches."). We evaluate the instant search pursuant to the general totality of the circumstances test in *Knights* because our supreme court has determined that *Griffin*'s analysis is not applicable to Florida's probationary system. *See Soca v. State*, 673 So.2d 24, 27 (Fla. 1996) ("[W]e reject the State's argument ... that Florida's statutory scheme regulating probation supervision ... is sufficiently analogous to the Wisconsin regulation at issue in *Griffin* [ ] so as to make the holding in *Griffin* controlling here.").

4 Our supreme court reaffirmed *Grubbs* in *Soca*, 673 So.2d at 28.

5 Unlike *Knights* and *Grubbs*, *Riley* did not involve a probationary search.

6 Although *Grubbs* did not expressly hold that a probationary search is reasonable in the absence of individualized suspicion, we conclude that it implicitly did so. *Accord Harrell v. State*, 162 So.3d 1128, 1132 (Fla. 4th DCA 2015) ("[T]he parties do not dispute that there was no reasonable suspicion to search; therefore, *Grubbs* is controlling."). Notably, *Grubbs* expressly required a traditional exception to the warrant requirement (for example, reasonable suspicion to support a *Terry* stop and frisk) if the evidence is used in new criminal proceedings. *Grubbs*, 373 So.2d at 907, 910. However, it referenced no such requirement when evidence is used solely in probation proceedings. *Id.* Regardless, we would conclude that the search in this case was reasonable based on a totality of the circumstances even if it were not already factored into the analysis in *Grubbs*. *Cf. United States v. King*, 736 F.3d 805 (9th Cir. 2013) (search reasonable despite lack of suspicion where probationer's underlying offense was violent).

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163 So.3d 721
District Court of Appeal of Florida,
Fifth District.

STATE of Florida, Appellant,
v.
David Melbourne LINDSAY, Appellee.

No. 5D14–3873.
|
May 1, 2015.

Synopsis

Background: Defendant pleaded guilty and was convicted in the Circuit Court, Brevard County, Robert A. Wohn, Jr., J., of lewd and lascivious molestation of a minor child. State appealed downward departure sentence.

Holdings: The District Court of Appeal, Lambert, J., held that:

[1] defendant's cooperation with the State regarding his current offense did not support departure sentence;

[2] evidence did not support finding that offense was committed in an "unsophisticated manner"; and

[3] evidence did not support finding that defendant expressed "remorse."

Reversed and remanded.

West Headnotes (8)

[1] **Criminal Law**
Sentencing

Competent substantial evidence supporting downward departure sentence is tantamount to legally sufficient evidence, and the appellate court will assess the record evidence for its sufficiency only, not its weight.

1 Cases that cite this headnote

[2] **Sentencing and Punishment**
Downward Departures

After finding a valid legal ground for downward departure sentence, trial court must determine whether the departure is the best sentencing option for the defendant by weighing the totality of the circumstances.

2 Cases that cite this headnote

[3] **Sentencing and Punishment**
Remorse, cooperation, assistance

Defendant's cooperation with law enforcement in connection with his guilty plea to lewd and lascivious molestation of a minor child was insufficient to support downward departure sentence; well before defendant's cooperation, the State had already received evidence from the victim of the crime and then heard a controlled telephone call between defendant and the victim, which provided additional proof of the crime. West's F.S.A. § 921.0026(2)(i).

[4] **Sentencing and Punishment**
Remorse, cooperation, assistance

A downward departure sentence is not justified merely because the defendant cooperated after his offense was discovered, because that cooperation did not solve a crime. West's F.S.A. § 921.0026(2)(i).

[5] **Sentencing and Punishment**
Offense-Related Factors

Sentencing and Punishment
Remorse, cooperation, assistance

All three elements must exist to justify a downward departure sentence on grounds that the crime "was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse." West's F.S.A. § 921.0026(2)(j).

2 Cases that cite this headnote

[6] **Sentencing and Punishment**
Offense-Related Factors

Where an adult defendant has committed lewd molestation on a child victim, it might be difficult, if not impossible, to prove that he committed the offense in an "unsophisticated manner," as would support downward departure sentence. West's F.S.A. § 921.0026(2)(j).

1 Cases that cite this headnote

[7] **Sentencing and Punishment**
Offense-Related Factors

Evidence did not support finding that defendant's offense of lewd and lascivious molestation of a minor child was committed in an "unsophisticated manner," as would support downward departure sentence; 45-year-old defendant, a well-educated teacher and youth counselor, remained friends with the 14-year-old victim long past the end of their professional relationship and, while the victim was at defendant's residence watching a movie, defendant waited until the victim appeared to be sleeping, and then placed his hands in the child's pants and massaged his genitals. West's F.S.A. § 921.0026(2)(j).

[8] **Sentencing and Punishment**
Remorse, cooperation, assistance

Evidence was insufficient to support finding of "remorse" as would support imposition of downward departure sentence following guilty plea to lewd and lascivious molestation of a minor child; State was required to prove that defendant intentionally touched the genitals of the victim in a lewd or lascivious way, but defendant's testimony at sentencing made clear that, in his mind, if he did anything, it was unintentional. West's F.S.A. §§ 800.04(5), 921.0026(2)(j).

Attorneys and Law Firms

***722** Pamela Jo Bondi, Attorney General, Tallahassee, and Rebecca Rock McGuigan, Assistant Attorney General, Daytona Beach, for Appellant.

Adam Pollack, of Law Office of Adam L. Pollack, P.A., Orlando, for Appellee.

Opinion

LAMBERT, J.

The State of Florida appeals the downward departure sentence imposed on ***723** David Melbourne Lindsay after he pleaded guilty to one count of lewd and lascivious molestation of a minor child. Because the trial court's grounds for the departure sentence were either legally insufficient or factually unsupported, we reverse.

Lindsay worked as a counselor in a youth and family services program when he first met the victim, who was a child assigned to the program. Lindsay became the victim's counselor and, after counseling sessions and the victim's involvement in the program ended, Lindsay remained friends with the child. The victim would visit Lindsay's house and use Lindsay's Internet to play his Xbox. Lindsay taught the child to drive when the child was 13 years of age and made financial payments for the child's cell phone bill. Eventually, Lindsay was terminated from his employment for financially assisting the victim's family.

Lindsay had known the victim for approximately one year

before he committed the crime. One evening, Lindsay and the victim were watching a movie together at Lindsay's residence, and when the victim's eyes were closed, Lindsay put his hands down the victim's pants and touched or massaged the child's genitals. At the time, Lindsay was 45 years of age and had two master's degrees. The victim was 14 years of age. The victim reported the incident to law enforcement. After law enforcement obtained additional evidence of the crime by listening to a controlled phone call between Lindsay and the victim, Lindsay was arrested. The court accepted Lindsay's open plea of guilty and, though Lindsay's minimum guideline sentence was 51 months in the Department of Corrections, the court imposed a significant downward departure sentence of two years of community control to be followed by ten years of probation.

"The primary purpose of sentencing [pursuant to the Criminal Punishment Code ("CPC")] is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment." § 921.002(1)(b), Fla. Stat. (2013). In *Jackson v. State*, 64 So.3d 90 (Fla.2011), the Florida Supreme Court explained sentencing requirements under the CPC as follows:

> Generally, a trial court must impose, at a minimum, the lowest permissible sentence calculated according to the CPC unless there is a valid reason to impose a downward departure sentence. *See* § 921.0024(2), Fla. Stat. (2008). For noncapital offenses committed on or after October 1, 1998, "the lowest permissible sentence provided by calculations from the total sentence points pursuant to s. 921.0024(2) is assumed to be the lowest appropriate sentence for the offender being sentenced." § 921.00265(1), Fla. Stat. (2008).
>
> A departure sentence is one that "decreases an offender's sentence below the lowest permissible sentence" provided by calculations from the total sentence points. § 921.00265(2), Fla. Stat. (2008); *see also* Fla. R.Crim. P. 3.704(d)(27)(A). A trial court must not impose a downward departure sentence unless mitigating circumstances or factors are present which reasonably justify such a departure. §§ 921.0026(1), 921.00265(1), Fla. Stat. (2008); Fla. R.Crim. P. 3.704(d)(27). Section 921.0026(2) sets forth a nonexclusive list of mitigating factors under which a departure from the lowest permissible sentence is reasonably justified. § 921.0026(2), Fla. Stat. (2008).

Id. at 92.

[1] [2] This court has previously explained the appropriateness of a downward departure as follows:

> ***724** To determine whether a downward departure sentence is appropriate, the trial court follows a two-step process. [*State v.] Mann*, 866 So.2d [179,] 181 [(Fla. 5th DCA 2004)]; *Staffney [v. State*], 826 So.2d [509,] 511 [(Fla. 4th DCA 2002)]. First, the court must determine whether there is a valid legal ground for the departure sentence, set forth in statute or case law, supported by facts proven by a preponderance of the evidence. *Id.* The defendant bears the burden of proof. *Mann*, 866 So.2d at 181. This step is a mixed question of law and fact and will be sustained on review if the court applied the right rule of law and if competent substantial evidence supports its ruling. *Staffney*, 826 So.2d at 511; *Mann*, 866 So.2d at 181.

State v. Subido, 925 So.2d 1052, 1057 (Fla. 5th DCA 2006). "Competent substantial evidence is tantamount to legally sufficient evidence, and the appellate court will assess the record evidence for its sufficiency only, not its weight." *Banks v. State*, 732 So.2d 1065, 1067 (Fla.1999). "The second step requires the trial court to determine whether the departure is the best sentencing option for the defendant by weighing the totality of the circumstances." *Subido*, 925 So.2d at 1057. Because we find that the court erred under the first step, we need not address the second step.

[3] [4] At sentencing, the trial court set forth two reasons for a downward departure sentence. First, the trial court found that Lindsay "cooperated with the State to resolve the current offense or any other offense." *See* § 921.0026(2)(i), Fla. Stat. (2013). We conclude, however, that the evidence justifying a downward departure sentence on this ground was both legally insufficient and factually unsupported. Lindsay testified at the sentencing hearing that he did not help the State resolve any other offense. Furthermore, while Lindsay may have cooperated with law enforcement regarding the current offense, "[a] downward departure sentence is not justified merely because the defendant cooperated after his offense was discovered because that cooperation did not solve a

crime." *State v. Knox*, 990 So.2d 665, 668 (Fla. 5th DCA 2008); *see also State v. Bleckinger*, 746 So.2d 553, 555 (Fla. 5th DCA 1999) (stating that "[t]he statutory mitigating factor of cooperation requires more than a confession to the authorities after arrest and pleading guilty" (footnote omitted)). Here, well before Lindsay's cooperation, the State had already received evidence from the victim of the crime and then heard the controlled telephone call between Lindsay and the victim, which provided additional proof of the crime. Therefore, the trial court was not justified in using Lindsay's cooperation with law enforcement as a mitigating circumstance.

[5] [6] [7] Second, the trial court found that the crime "was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse." *See* § 921.0026(2)(j), Fla. Stat. (2013). All three elements must exist to justify a departure under this ground. *Subido*, 925 So.2d at 1057. While the record indicates that this was an isolated incident, we find that the evidence was insufficient to establish that this crime was done in an unsophisticated manner or that Lindsay has shown the requisite remorse. Initially, we note that where "an adult defendant has committed lewd molestation on a child victim, 'it might be difficult, if not impossible, to prove that he [committed the offense] in an unsophisticated manner.' " *State v. Munro*, 903 So.2d 381, 383 (Fla. 2d DCA 2005) (alteration in original) (quoting *State v. Bernard*, 744 So.2d 1134, 1135 (Fla. 2d DCA 1999)); *cf. Subido*, 925 So.2d at 1057–58 ("It is difficult, if not impossible, to prove that a sexual battery against a minor occurred in an unsophisticated fashion."). Here, the record indicates ***725** that Lindsay remained friends with the victim long past the end of their professional relationship and, while the victim was at Lindsay's residence watching a movie, Lindsay waited until the victim appeared to be sleeping, and then placed his hands in the child's pants and massaged his genitals.

To support the trial court's finding of unsophistication, Lindsay relies on *State v. Merritt*, 714 So.2d 1153 (Fla. 5th DCA 1998). However, we find this case is distinguishable. In *Merritt*, the almost 16–year–old victim was described as someone who "did not need to be instructed on how or what to perform," while the defendant was described as "nervous and unable to attain an erection, and his acts were artless, simple and not refined." 714 So.2d at 1154 n. 3. In contrast, Lindsay is a well educated 45–year–old man who has been both a teacher and a youth counselor and was molesting a 14–year–old boy that appeared to be sleeping. Accordingly, we find that the trial court's finding of unsophistication was not supported by the evidence.

[8] We also conclude that the following testimony from Lindsay at sentencing is legally insufficient to establish remorse:

> Q: What did you do to the victim in this case?
>
> A: Well, according to the report that I touched him inappropriately.
>
> Q: And where did you touch the victim?
>
> A: On his genitals.
>
> Q: Okay. And did you actually touch the skin or overly—over his clothing?
>
> A: I am not sure.

On cross-examination, Lindsay testified:

> Q: Earlier in your testimony you said that according to the report you touched the victim on his genitals inappropriately.
>
> A: Em-hmm.
>
> Q: Did you do that?
>
> A: Well, accord—again—I am—everything is still a fog for me personally because of the fact that what I was reaching for was my phone that was on the bed and realizing what took place then I immediately got up and woke him up and said, okay, it's time for you to go to the next room.
>
> Q: So, you're not saying that you intentionally—
>
> A: I did not intent—
>
> Q: (cont'd) did this act?
>
> A: No, I did not intentionally do this.

"Remorse" is defined as "[a] strong feeling of sincere regret and sadness over one's having behaved badly or done harm; intense, anguished self-reproach and compunction of conscience, esp. for a crime one has committed." *Black's Law Dictionary* 1487 (10th ed. 2014). To prove the crime charged, the State was required to prove that Lindsay intentionally touched the genitals of the victim in a lewd or lascivious way. § 800.04(5), Fla. Stat. (2013). Lindsay's testimony makes it clear that, in his mind, if he did anything, it was unintentional. This evidence is legally insufficient to demonstrate remorse.

Because the two grounds utilized by the trial judge for imposing the downward departure sentence were either

legally insufficient or not supported by competent, substantial evidence, or both, the sentence is reversed. On remand, the trial court is not precluded from imposing a downward departure sentence if such a sentence is supported by valid grounds. *Jackson*, 64 So.3d at 90. Otherwise, the court must impose a guideline sentence.

REVERSED and REMANDED.

PALMER and EVANDER, JJ., concur.

All Citations

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