APPLICATION FOR NOMINATION TO THE COUNTY 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: Craig R. Atack **Social Security No.** [redacted]

Florida Bar No.: 0027450 **Date Admitted to Practice in Florida: 9/25/2006**

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.

Employed by the State of Florida as an Assistant Public Defender, Division Chief

Law Office of the Public Defender
4010 Lewis Speedway, Suite 1101
St. Augustine, FL 32084

(904) 827-5699

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).

I have resided at [redacted] since January of 2020.

I am a lifelong Florida resident.

[redacted]

3. State your birthdate and place of birth.

April 14, 1976

Orlando, 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.

The Florida Bar.

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

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).

Florida International College of Law, Inaugural Class 2002-2005, Juris Doctorate, Class standing: 52, GPA 2.3
University of Florida, College of Education, 1998-2000, M.Ed, GPA 3.5
University of Florida, B.A. in History, Minors in English and Education GPA 3.3
Flagler Palm Coast High School, 1990-1994, Honors

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.

Intramural swimming, softball and basketball. I also was a member of the University of Florida Rowing team.

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.

September 2005 – May 2006. Substitute Teacher. St. Augustine, FL

December 2001 – June 2002. Construction/Labor. The Pentagon. Washington, DC

August 2000 – June 2001. Public School Teacher. Chamblee High School. Atlanta, GA

May 1999 – August 1999. Hospitality. Yosemite National Park. Yosemite, CA

January 1999 - June 1999. Food Service. Hop's Restaurant. Daytona Beach, FL

August 1998 – December 1998. Retail. Border's Books and Music. Richmond, VA

May 1997 – August 1997. Dishwasher. Denny's Restaurant. 7 Kings Hwy, Palm Coast, FL

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 have represented indigent criminal defendants for the entirety of my legal career. From 2013 to 2021, I served as an appellate counsel for indigent clients in the 5th District Court of Appeal, while also representing indigent clients in the 7th Judicial Circuit facing involuntary civil commitment, as well as those already involved in the Florida's involuntary civil commitment treatment program. Persons facing involuntary civil commitment are often indigent and require a lawyer to navigate the complex path before them. I was hand-picked for this unique assignment because of my office-wide trial experience and have since become fluent in mental health issues, specifically those involving mental abnormalities and personality disorders, and the evidence code as applied in a civil context. Handling both an appellate and civil commitment trial docket simultaneously requires a heightened responsibility to manage scheduling and logistical issues involving everything from deposing expert witnesses to meeting appellate deadlines and staying informed of new caselaw.

In contrast, my current and prior experience handling both felony and misdemeanor trial dockets involves handling a case from start to finish, including bond hearings, motion practice, plea negotiations, trials and sentencing.

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	20 %
Federal Trial	_____ %	Criminal	80 %
Federal Other	_____ %	Family	_____ %
State Appellate	60%	Probate	_____ %
State Trial	40%	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:

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

Jury?	40-50	Non-jury?	60
Arbitration?		Administrative Bodies?	
Appellate?	157		

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.

Richard Lowell Bennett, 5D13-0694. Oral argument in front of the 5th DCA on January 21, 2014. Office of the Attorney General, Kristen Davenport: kristen.davenport@myfloridalegal.com [redacted]

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*.

Rebecca Emert, emert.R@sao7.org and Rachel Demurs, demurs.R@sao7.org [redacted]

Defendant Stephon Larobert Wright: 2018-00787CF

Defendant Rafael Alejandro Mirabal Bonara: 2018-01877CF

Phil Havens, havens.P@sao7.org [redacted]

(SVP Respondents)

Robert Masters: CP-2002-00667

Jeffrey Carr: CP-2006-00612

Then Assistant State Attorney, now Judge Kenneth Janesk [redacted]

SVP Respondent Barry Freeman: 2007-006560-CA-54

Phillip Bavington: philipb@coj.net [redacted]

SVP Respondent Jesse McCoy: 2016-00364-CA-54

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*.

N/A

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 been assigned to a county court trial docket for the last 8 months and appear in court 3-4 times per week. While I was in the Appellate Division, I also handled the Sexually Violent Predator docket and would appear in court 1-3 times per month.

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.

N/A

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?

N/A

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.

I feel I need to preface this list by reminding the committee that my choice to be an Assistant Public Defender entails the lofty goal of providing excellent legal representation to whomever I am assigned to represent. When I compiled this list, I found they were cases I have not necessarily shared

with my friends or family as most people would find the charges, or the client, or both, categorically repugnant. It is for that very reason I am most proud to have fulfilled my goal and responsibility as an Assistant Public Defender in representing them. Judges have similar responsibility to ensure every person that comes before them will be treated fairly as a human being, equal under the law.

1. **Robert Larquan Collins (2010-00949-CF)**

Facing life in prison, Mr. Collins insisted on having a jury trial. His alleged co-defendant testified against him and his cell phone records placed his cell phone near the shooting during the time the shooting took place. Both co-defendants were masked and one of the shots fired entered the home and struck a pregnant woman. The jury acquitted. I list this case not because Mr. Collins was facing life in prison, but because the State's plea offer guaranteed he would spend less than 10 years in prison had he not exercised his right to a trial. This case is a reminder of the pressure both the State and defense face when a case goes to trial, and that the jury's verdict can surprise everyone in the courtroom.

Judge Wendy Berger: chambers_flmd_berger@flmd.uscourts.gov[redacted]

Assistant State Attorney Jenny Dunton: duntonj@sao7.org[redacted]

Joshua Alexander: josh@thalexanderlawfirmllc.com[redacted]

2. **7th Circuit Sexually Violent Predator (SVP) docket**

From 2014 to 2021, I was assigned to both writing appeals in the 5th District and handling the Sexually Violent Predator (SVP) docket for the 7th circuit. The SVP docket is similar to a felony trial docket in that the Detainees are entitled to a jury trial, and if committed, Respondents are entitled to a series of

evidentiary hearings. The nature of these cases can confuse jurors, judges, lawyers and the clients alike. Uniquely, the SVP docket involves regular trips to the Florida Civil Commitment Center in Arcadia, Florida, extensive depositions and questioning of mental health experts, and the application of civil rules. In apposite to trial work, the lawyer assigned to the SVP docket is in communication with his clients for the duration of their commitment, treatment and eventual release, regardless of how long that process takes to complete.

Facing a jury trial, every Detainee I've represented expressed a feeling of helplessness. Two juries have decided clients of mine did not meet the criteria to be committed as Sexually Violent Predators. **Travis Griest (2015-10174-CIDL)** and **Jose Gonzalez (2014-31375-CICI)** were two detainees facing civil commitment. The State made no "offers" to incentivize them to self-commit to treatment as Sexually Violent Predators. Mr. Gonzalez had an expert who opined he did not meet the criteria for commitment but Mr. Griest had no expert to testify on his behalf. Their respective juries found neither of them met the criteria to be SVP's. These cases fine-tuned my appreciation for voir dire and jury selection and helped me to be conversant in the rules of evidence in the civil law context and apply them during a jury trial.

Judge Randall Rowe, [redacted]

Assistant State Attorney Dustin Havens: havens.D@sao.org [redacted]

3. **Thomas Schaffer (2000-32435-CICI)**

Mr. Schaffer entered into a plea agreement with the State to serve 364 days in prison, served that time and spent the next 19 years in the Florida Civil Commitment Center. As the judge noted in his order,

much of that time was due to his refusal to participate in treatment, also making it difficult to find an expert to advocate for his release. Mr. Schaffer's case seemed hopeless, and stands as a reminder that each and every person in our legal system has a unique story that often falls on deaf ears. After years of encouraging him to more to help himself, an expert finally opined he was safe to be at large. Since his release, Mr. Schaffer has become employed and avoided our criminal justice system.

Judge Randall Rowe, [redacted]

Assistant State Attorney Dustin Havens: havens.D@sao.org [redacted]

4. **St. Johns County Drug Court**

In St. Johns County, I truly appreciated being a member of the Drug Court team and participating in the weekly team conferences regarding what to do with the people struggling in Drug Court. None of the participants stands out specifically, but I felt like that population appreciated our encouragement, and there is a real sense of satisfaction seeing them graduate and tell their stories. As a trial attorney with that office, I was able to get some of my own clients into Drug Court, and the successful graduates truly turned their lives around.

Judge Wendy Berger, chambers_flmd_berger@flmd.uscourts.gov [redacted]

Assistant State attorney Richard Price, price_ricahrd@bellsouth.net [redacted]

5. **Kenneth Somers (5D13-4160)**

On appeal, the 5th District Court of Appeal found a retired trial judge had been vindictive in sentencing. On re-sentencing, a different judge imposed a sentence of approximately 30 fewer years in prison that

the first sentence. Every appellate case requires the attorney to become an expert in some minutia of the law, and this was one of my first cases where I was suspicious the original trial judge imposed a vindictive sentence. Not only did I learn that particular area of the law, but I gained some confidence in my ability to spot issues on appeal. Finally, the new sentence was tangible relief I am sure my client appreciated. The brief is attached.

Assistant Attorney General L. Charlene Matthews: Linda.matthews@myfloridalegal.com

[redacted]

5th District Court of Appeals 3- Judge Panel: Judges Cohen, Lawson and Berger[redacted]

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.

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.

N/A

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.

Judicial Nominating Commission; August of 2019; Yes, my name was certified to the Governor's Office

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.

N/A

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.

N/A

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.

N/A

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.

N/A

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.

N/A

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.

N/A

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.

In 2012, I was a candidate for Flagler County Judge. I won the primary and lost the general election by just over 2 percentage points, or 1020 votes.

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.

No

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.

No

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. N/A

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. N/A

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. N/A

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. N/A

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.

2008; Daytona State College, College of Business: "Legal, Social and Ethical Issues in Business." N/A

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. N/A

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

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. N/A

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. N/A

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. N/A

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

I have not done pro bono legal work aside from the last 15 years service as an Assistant Public Defender.

45. Please describe any hobbies or other vocational interests.

I spend all my time outside of work with my two children, ages 5 and 1. If I am playing, or reading, or swimming I'm likely with them.

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. N/A

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

In 2012 I utilized a Facebook page titled: https://m.facebook.com/atackforjudge/

I have not logged onto that page since 2012, but Facebook has not deleted the page.

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.

Married to [redacted] on February 21, 2015. She is a lawyer, part-time sole-practitioner and full-time mother, working both jobs from home.

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.

[redacted]

[redacted]

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.

[redacted]

[redacted]

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.

Thomas Desparte, a Respondent at the Florida Civil Commitment Center, initiated a lawsuit against which he subsequently voluntarily dismissed. 2019-36053 COCI

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? N/A

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. N/A

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. N/A

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. N/A

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. N/A

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. N/A

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

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. N/A

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. N/A

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. N/A

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. N/A

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. N/A

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.) N/A

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. N/A

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. N/A

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

SUPPLEMENTAL INFORMATION

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

My experience teaching at all grade levels, including college, has provided me with the confidence to prepare and present information to a group, and to communicate with an audience in a group setting. I've also held a number of jobs across a wide-range of occupations, including retail, food service, and manual labor. Many lawyers' paths are insulated from the "real world" in that they go from high school, to college to law school. I believe my various job experiences have helped round out my life-experience.

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.

During the 7 years I worked in the Appellate office, I came to appreciate the makeup of the judiciary branch in Florida's 5th District. It seems the 7th Circuit differs from the larger 5th District in that we have little representation from the Public Defender's office on the bench. I have served 15 years as an Assistant Public Defender, and I believe my appointment would help the Governor push back at detractors who note how few judges in the 7th circuit have any experience working as an Assistant Public Defender.

As Division Chief of the St. Johns office, I manage an office with 13 employees, including 7 lawyers. In addition to managing people, I also have experience running as a judicial candidate. In 2012, I won a 7-person primary and earned 49% of the vote in Flagler County. I lived here in St. Johns County between 2010 and 2013 and worked as a felony trial attorney. I have moved back to manage the St. Johns office. If appointed to this seat, I am confident I have the energy and knowhow to run a successful campaign.

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.

Judge Charles Tinlin, St. Augustine, [redacted]

Judge Christopher Ferebee, St. Augustine, [redacted]

Judge Kenneth Janesk, St. Augustine, [redacted]

Judge Wendy Berger, [redacted]

Retired Judge J. Michael Traynor, St. Augustine, [redacted]

Judge Randall Rowe, Deland (Volusia) [redacted]

Judge Christopher France, Bunnell (Flagler) [redacted]

Public Defender Matthew M. Metz, [redacted] **metz.matthew@pd7.org**

Assistant Public Defender, Appellate Division Chief George Burden, [redacted] **burden.george@pd7.org**

Retired Public Defender James S. Purdy, [redacted]

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 28th day of July, 2021.

Craig R. Atack

Printed Name

Signature

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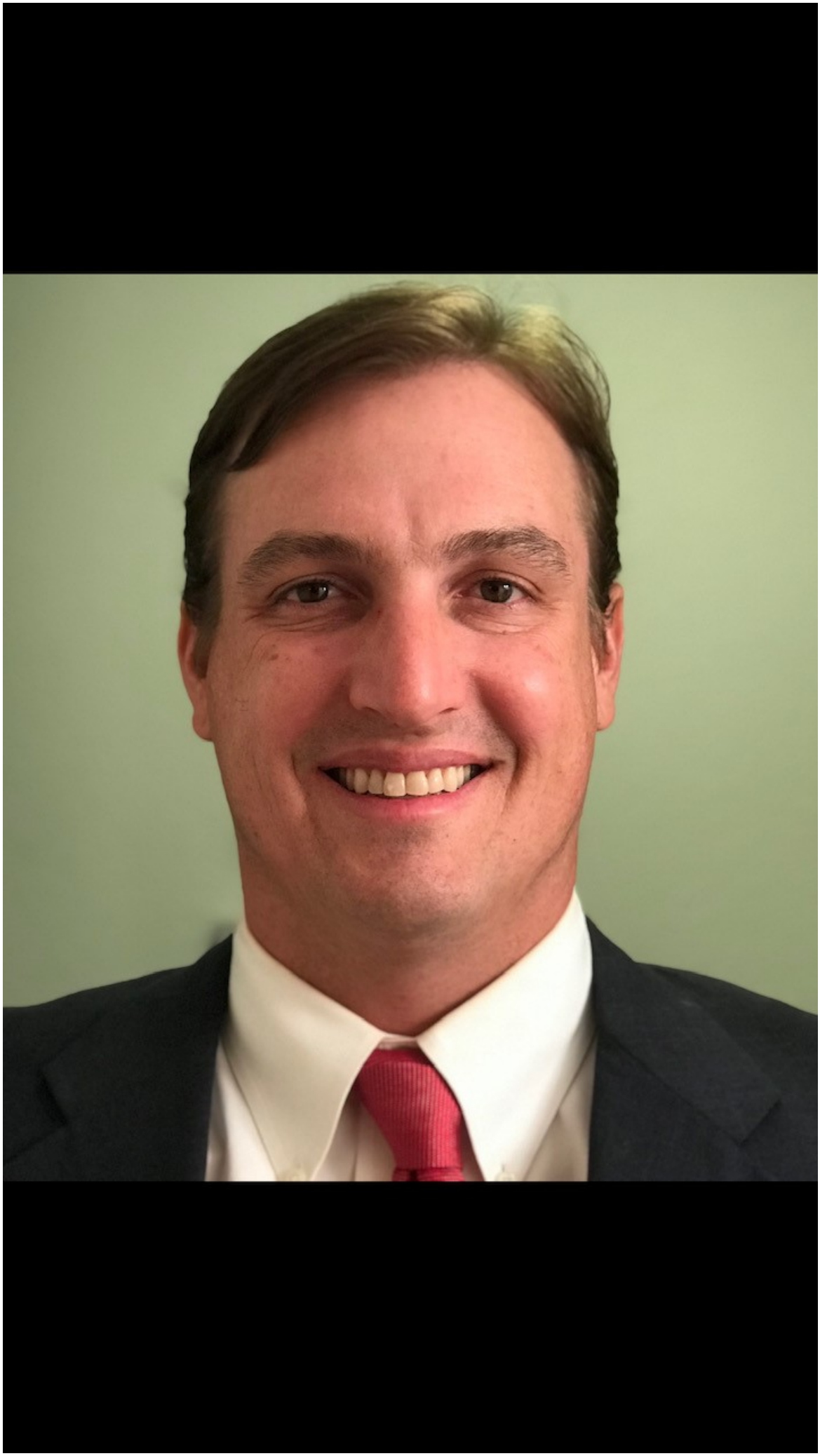

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF THE STATE OF FLORIDA

KENNETH SOMERS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 5D13-4160
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT IN FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CRAIG R. ATACK
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0027450
444 Seabreeze Blvd. - Suite 210
Daytona Beach, FL 32118
(386) 254-3758
Atack.craig@pd7.org

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

Mr. Kenneth Somers was charged by information with: count one, kidnaping with intent to inflict bodily harm or terrorize (with a weapon); count two, attempted first degree murder; count three, aggravated battery with a deadly weapon or causing great bodily harm (domestic violence); count four, tampering with a witness to hinder communication to a law enforcement officer. (Vol. I, R. 2, p.15-16)[1]

A jury trial was held on September 24, 2013. Prior to trial, the trial court inquired about plea negotiations. Plea negotiations ensued, and the State made a plea offer of seven years prison. The trial court told the parties "I don't know. But if I'm the one that's got to impose the sentence on you, I want to make sure that I look you in the eye and impose the sentence I have to impose, knowing full well I gave you every opportunity to consider all other options other than going to trial." (Vol. I, 14) The trial court also stated it did not like to "abuse victim's twice." (Vol. I, 20) The Appellant rejected the State's plea offer.

On or about October 10th, 2013, Appellant and Vanessa Tucker were in a domestic relationship, living at 6804 Anoka Drive, in Orange County, Florida. (Vol. II, p.82) An argument ensued wherein the Appellant and Ms. Tucker

[1]In this brief, the following symbols will be used: "Vol." refers to the volumes of the trial; "Vol." followed by "R" (Vol., R.) indicates a separate volume with two records in which the pretrial motions are found. "Sent." refers to the sentencing hearing. "p." indicates the page referenced.

contemplated ending their relationship. (Vol. II, p. 92-95) The argument began in the children's bedroom and continued down the hallway and into the kitchen. (Vol. II, p. 96) Once inside the kitchen, the Appellant stood behind Ms. Tucker and held a knife to her neck. (Vol. II, p. 97-98) When Ms. Tucker turned to face the Appellant, he grabbed her by the hair and dragged her into the garage against her will. (Vol. II, p. 101) In the garage, the Appellant attempted unsuccessfully to slice Ms. Tucker's throat, jammed the knife into her neck, pushed her onto the floor, and then walked away. (Vol. II, p. 104-105)

Detective Soto met with the Appellant and testified that the Appellant told her he did not want to speak to her. (Vol. II, p. 198) Defense counsel made a timely motion for mistrial based on the witness's comment on the Appellant's right to remain silent. (Vol. II, p. 199) The trial court denied the motion and gave the jury a curative instruction. (Vol. II, p. 200)

After the State rested their case, defense counsel renewed the motion for mistrial. (Vol. II, p. 235-242) The trial court again denied the motion. (Vol. II, p. 236-238; 253) Defense counsel moved for judgement of acquittal on all counts, and the trial court denied those motions. (Vol. II, p. 242-252)

The Appellant testified to prior occasions where Ms. Tucker used a knife in a threatening manner. (Vol. III, p. 285-292) On the day in question, he was attempting to leave the house through the garage when Ms. Tucker approached him from behind with a knife in hand. (Vol. III, p. 293) The Appellant testifed, acting in self-defense, he attempted to remove the knife from Ms. Tucker's hand. In his attempt, he pushed her onto the floor causing her to become injured. (Vol. III, p. 293-296) He went to his neighbor's house to call 911 after he left the altercation with Ms. Tucker. (Vol. III, p. 297-298)

The jury returned guilty verdicts for count one, kidnaping, count two, the lesser-included offense of attempted second-degree murder, count three, aggravated battery with a deadly weapon, or causing great bodily harm and not guilty on court four. (Vol. IV, p. 478-479) The trial court imposed a 40-year sentence on count one, concurrent to a 30-year sentence on count two and a 15-year sentence on count three, all of which are to be served in the Department of Corrections. (Sent. 31) A timely notice of appeal was filed and the Law Office of the Public Defender was appointed. (Vol. I, R. 2, p. 107) This appeal follows.

SUMMARY OF ISSUES

POINT I:

Appellant's only theory of defense was self-defense. When law enforcement commented on the Appellant's right to remain silent, that defense was immediately undermined. The fact that the Appellant did not profess a self-defense argument at the scene could cause the jury to disbelieve his testimony at trial. A mistrial should have been granted.

POINT II:

The Appellant dragged Ms. Tucker from the kitchen into the garage at knife point. Those rooms are separated by a small laundry room with a connecting door. That distance is not sufficient to satisfy the "confinement" element of the kidnaping statute. A judgement of acquittal should have been granted on that count.

POINT III:

The trial court imposed a vindictive sentence. The trial court initiated the plea discussions without being requested to do so by either party, made comments on the record urging the defendant to accept a plea, and implied that the sentence imposed would hinge on future procedural choices. The trial court imposed a sentence, without stating its reasons, more than five times longer than the plea offer Appellant rejected during the court initiated plea negotiations just before the

trial began.

POINT ONE

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL

Standard of Review

The standard of review for a denial of a motion for mistrial is abuse of discretion. Goodwin v. State, 751 So. 2d 537 (Fla.1999). A mistrial is appropriate following a comment on the defendant's right to remain silent only if the error was "so prejudicial as to vitiate the entire trial." Poole v. State, 997 So. 2d 382, 391 (Fla.2008)

Argument

During its case-in-chief, the State called Detective Soto. (Vol. II, 197) The following exchange occurred:

> PROSECUTOR: "Okay. Did you make contact with the defendant?
>
> WITNESS: Yes, ma'am, I did.
>
> PROSECUTOR: Were you able to make any observations of the defendant's person?
>
> WITNESS: Yes, I did. The defendant was very calm. He – I remember he had bloody shoes. And he – I remember he didn't want to speak to me.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Sustained.

> Ladies and gentlemen of the jury, you are to disregard that last statement. It goes back to what we talked about at the outset of the trial. A comment on the defendant's lack of a statement is inappropriate. And you are to completely ignore that last statement."

(Vol. II, 197)

A bench conference was held and defense counsel moved for a mistrial. (Vol. II, 200) The court asked if defense counsel would like an additional curative instruction; the defense declined and moved again for a mistrial. (Vol. II, 200) The judge denied the motion. (Vol. II, 200)

The due process clause of the Florida Constitution, article I, section 9, guards against prosecutorial comments on a defendant's post-arrest silence. See State v. Hoggins, 718 So. 2d 761, 770 (Fla.1998). The standard for determining what constitutes a comment on post-arrest silence is fairly liberal. "If the comment is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his or her right to remain silent, it violates the defendant's right to silence." Id. at 769; see also State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla.1986).

Clearly the trial court interpreted law enforcement's testimony to be a comment on the Appellant's right to remain silent. Defense counsel's generic objection was immediately sustained without the trial court requesting any explanation for the objection. The trial court, without any prompting, gave the jury the above curative instruction. (Vol. II, 197) The curative instruction itself

acknowledged the testimony was a comment on the right to remain silent.

An almost identical interaction between detective and prosecutor occurred in Mack v. State, 58 So. 3d 354, 355 (Fla. 1st DCA 2011):

> PROSECUTOR: Upon making contact with [the appellant], did he make any statements to you?
>
> WITNESS: He asked me who I was. I told him who I was. And he knew immediately because I asked him to call me to give me his side of the story.
>
> PROSECUTOR: Did he make any other statements to you?
>
> WITNESS: He said he'd rather talk to his attorney, and he didn't want to talk anymore.

The First District found this comment was not harmless beyond a reasonable doubt, reversed the conviction and remanded the case for a new trial. Mack, 58 So. 3d at 356.

In the instant case, the Appellant testified that Ms. Tucker was the aggressor and he acted in self-defense. (Vol. III, p.284-286; 293-296) The officer's comment on Appellant's right to remain silent likely caused the jury to doubt this defense. The jury likely wondered why the Appellant did not tell law enforcement that Ms. Tucker was the aggressor immediately following the event. Thus, the comment negated Appellant's defense.

The trial court's curative instruction was not a sufficient remedy. The trial

court had the discretion not to give a curative instruction if it believed that doing so would draw further attention to the improper comment. Israel v. State, 837 So. 2d 381, 389 (Fla.2002) Defense counsel never asked for a curative instruction. The curative instruction was given before Defense Counsel explained the basis of his objection, and drew attention to the fact that the Appellant chose not to speak with law enforcement on the scene. (Vol. II, p. 200). Thus, the curative instruction did not eliminate the harm done by the comment.

POINT TWO

TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL.

Standard of Review

The de novo standard of review is applied when reviewing a trial court's denial of a motion for judgment of acquittal. Pagan v. State, 830 So. 2d 792 (Fla. 2002), cert. denied, 539 U.S. 919, 123 S. Ct. 2278, 156 L. Ed.2d 137 (2003); McHolder v. State, 917 So. 2d 1043 (Fla. 5th DCA 2006); Sanchez v. State, 909 So. 2d 981 (Fla. 5th DCA 2005); Sutton v. State, 834 So. 2d 332, 334 (Fla. 5th DCA 2003). The Sutton court explained:

"This court has repeatedly held that a motion for judgment of acquittal should be denied if the state presents competent evidence to establish each element of the offense. L.C. v. State, 799 So. 2d 330 (Fla. 5th DCA 2001); Espiet v. State, 797 So. 2d 598 (Fla. 5th DCA 2001); V.L. v. State, 790 So. 2d 1140 (Fla. 5th DCA 2001). A motion for judgment of acquittal may be granted if the evidence, viewed in a light most favorable to the state, fails to establish a prima facie case of guilt. L.C.; Espiet; V.L. In moving for a judgment of acquittal, a defendant admits not only the facts stated in the evidence, but also every reasonable conclusion favorable to the state that the trier of fact might fairly infer from the evidence. Lynch v. State, 293 So. 2d 44 (Fla.1974); Espiet; A.L. v. State, 790 So. 2d 1149 (Fla. 2d DCA 2001). It is the trial judge's duty to review the evidence to determine

the presence or absence of competent evidence from which the trier of fact could infer guilt to the exclusion of all other reasonable inferences. "If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." Pagan, 830 So. 2d at 803 (citing Banks v. State, 732 So. 2d 1065 (Fla.1999))." Sutton, 834 So. 2d at 334.

"In considering whether conduct involving another crime also amounts to a kidnaping, our supreme court teaches that one must "closely examine the facts to determine whether the confinement or movement was incidental to the [other charged crime] or whether it took on an independent significance justifying a kidnapping conviction." Mobley v. State , 409 So. 2d at 1035 (Fla. 1982).

Argument

At the close of the State's case, the Appellant moved for a judgement of acquittal on count one, kidnaping (Vol. II, 242-247). Specifically, defense counsel argued that there was not a prima facie case to satisfy the "confinement" element of that charge. (Vol. II, 243-244) The facts elicited through Ms. Tucker's testimony were that Appellant dragged her from the kitchen to the garage at knife point. (Vol. II, 101) Ms. Tucker testified that she was cut in the kitchen and stabbed in the garage. (Vol. II, p. 97; 104-105) The State relied on Maldonado v. State, 51 So. 3d 644 (Fla.5th DCA 2011), where a victim was dragged at gunpoint, by her hair, down a hallway and up half a flight of stairs to a more secluded landing in the back of a building. The instant case is distinguished because the proximity of the garage to the kitchen is much closer than the situation in Maldonado.

Tucker testified that the Appellant grabbed her by the hair and pulled her into the garage, detailing the relative proximity of the two rooms. (Vol. II, p. 101; 106; 149) On direct and cross-examination, Ms. Tucker testifies there is a door connecting the kitchen and laundry room to the garage. (Vol. II, p.106; 149) She also testified there is a garage door opening to the outside, but that she was unable to operate it because of the injury to her neck. (Vol. II, 148) The Appellant's garage and kitchen are separated by a door, while the victim in Maldonado was

taken up a flight of stairs and into a separate room. The facts of the instant case support a prima facie case of aggravated battery where the movement from one room to the other is incidental to the aggravated battery.

POINT THREE

THE TRIAL COURT ERRED BY SENTENCING THE DEFENDANT VINDICTIVELY.

If a court inserts itself into plea negotiations, and if a harsher than offered sentence is meted out after the rejection of the bargain, a determination must be made regarding whether there is a reasonable likelihood that the harsher sentence was vindictive. See Wilson v. State, 845 So. 2d 142 (Fla.2003). In Wilson, the Florida Supreme Court declined to adopt a presumption of vindictiveness to be applied in all cases in which a judge participates in failed plea negotiations, and then sentences the defendant more severely than the sentence contemplated. Instead, the high court concluded that a totality of circumstances analysis is more appropriate. Wilson, 845 So.2d at 156; See also, Vondervor v. State, 847 So. 2d 610 (Fla. 5th DCA 2003).

> The factors identified in Wilson to be considered in the totality of circumstances calculus include (1) whether the trial judge initiated the plea discussions without being requested to do so by either party; (2) whether the trial judge, through his or her comments on the record, appears to have departed from the required role as an impartial arbiter either by urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as whether the defendant exercises his or her right to go to trial; (3) whether there is a disparity between the plea offer and the ultimate sentence imposed and the quantum of that disparity; and (4) the lack of any facts on the record that explain the reason for the increased sentence

> other than that the defendant exercised his or her right to a trial or hearing.

Evans v. State, 979 So. 2d 383 (Fla. 5th DCA, 2008) (citations omitted)

In the instant case, factors one, three and four are clearly met. At the start of the hearing, after reading the amended information and detailing the maximum potential sentence to the Appellant for the first time, the trial court inquired as to whether there was plea offer from the State. (Vol. I, p. 5; 11) Neither party requested the trial court to make this inquiry. In fact, the discussions that followed indicate plea negotiations had broken down long before this hearing. (Vol. I, 11-26) Therefore, factor one is met.

After the trial, at sentencing, and after listening to both sides make sentencing arguments, the trial court imposed a sentence of 40 years in prison. (Sent. 31) There is great disparity between the plea offer of 7 years and the 40 years the Appellant will actually serve in the Department of Corrections. The trial court gave no reason for disparate sentence. (Sent. 31) Therefore, factors three and four have been met.

The trial court's statements below establish the second factor. It is clear the trial court was interested in resolving this case short of having a trial. (Vol. I, 3-28) Upon calling the case for trial, the trial court reminded the Appellant of his maximum sentence exposure and repeatedly encouraged the defense attorney to

speak with the Appellant about a plea deal. Throughout this time, the trial court explained why the plea negotiation process is important.

The trial court described the benefits of accepting a plea offer as compared to the "crapshoot" that would result if the Appellant exercised his constitutional right to have a jury trial. (Vol. I, 14) Numerous times the trial court talked to the Appellant about the trial court's role in sentencing. "It's a crapshoot. It's a roll of the dice. And sometimes the devil you know is better than the devil you don't." The trial court then said "I don't know. But if I'm the one that's got to impose the sentence on you, I want to make sure that I look you in the eye and impose the sentence I have to impose, **knowing full well I gave you every opportunity to consider all other options other than going to trial**." (Vol. I, 14) (emphasis added) At one point during this process, the State returned to court unable to make a plea offer below the guidelines and the trial court encouraged defense counsel to speak to the Appellant about the time he has served and what percentage of the sentence he would actually serve in prison. (Vol. I, 16-17)

The trial court stated "if the defendant would agree to take something **in lieu of going to trial**, ***and*** **if the victim can avoid having to re-live everything through testifying**, then my view of it is that I'm willing to take the time that's necessary to make sure it gets done." (Vol. I, 19) (emphasis added)

Later, the trial court stated "I just don't like to abuse victims twice." (Vol. I,

20) Soon thereafter, the prosecutor made a plea offer of seven years prison as a downward departure on all counts. (Vol. I, 23). Thus, the second factor was met.

The trial judge, through his comments, departed from the required role as an impartial arbiter by urging the defendant to accept a plea and implying that the sentence imposed would hinge on future procedural choices.

At sentencing, the trial court looked Appellant in the eye and knew he had given Appellant every opportunity to resolve the case short of trial. He had gone through great lengths to warn the Appellant against taking this constitutional route to resolve his case. The Appellant defied him, made the victim "relive everything through testifying." (Vol. I, 19) By exercising his fundamental right to have a jury trial, Appellant had, in the trial court's words, "abuse(d) the victim twice." (Vol. I, 20) The trial court, without giving any reasons, then imposed a sentence 33 years greater than the plea offer. This sentence meets the Wilson factors and is vindictive.

CONCLUSION

BASED UPON the foregoing cases, authorities and facts, the undersigned counsel requests this Court to vacate the conviction and discharge Appellant, or

alternatively remand the case to the trial court for a new trial, or alternatively remand the case for a new sentencing hearing.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
CRAIG R. ATACK
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0027450
444 Seabreeze Blvd., Suite 210
Daytona Beach, FL 32118
atack.craig@pd7.org
(386) 254-3758

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

DESIGNATION OF E-MAIL ADDRESS

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary) and atack.craig@pd7.org (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically with the Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, Florida 32114, at https://edca.5dca.org; delivered electronically to the Office of the Attorney General, 444 Seabreeze Boulevard, fifth floor, Daytona Beach, Florida 32118, at crimappdab@myfloridalegal.com; and a true and correct copy thereof delivered by USPS to Mr. Kenneth Somers, Inmate #X83835, Taylor Correctional Institution, 8515 Hampton Springs Road, Perry, Florida 32348-8747 on this 16th day of July, 2014.

_____
CRAIG R. ATACK
ASSISTANT PUBLIC DEFENDER

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

KEIANDRE LENARD LOVETT,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 5D17-1657
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE FIFTH CIRCUIT COURT
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CRAIG R. ATACK
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0027450
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
(386) 254-3758
Atack.craig@pd7.org

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

A. Charges

Keiandre Lovett, Appellant, was charged by Information in Orange County with armed burglary of a dwelling with a firearm (count one), possession of a firearm by a convicted felon (count two), and resisting an officer without violence (count three). (ROA 25-7) After trial, the State nolle prossed count two. (T 332)

Lovett appeals the trial court's denial of his motion for judgment of acquittal on the issue of whether he was in possession of a firearm after the commission of the burglary for purpose of sentencing under Florida Statutes 775.087(2), also known as the 10-20-Life statute.

B. Relevant trial testimony

On the morning of the burglary, the last of the Nieves family left their home at 9:30 am. (T 55-59) Around 3:30 pm that same day, Mr. Nieves's daughter returned home from school and found the sliding- glass door had been broken. (T 54-5) She immediately called her father. (Id.) Mr. Nieves stopped what he was doing, immediately came home and noticed jewelry and a firearm missing. (T 56-8) Around this same time, Detective Talley responded to a "suspicious person call" in the area he was patrolling and saw two males matching the description detailed in the call. (T 79-81) The two males were walking in a different subdivision than the one where the Nieves lived. (T) Both males disobeyed Talley's orders to stop

and instead took flight. (T 83) Talley chased the two on foot and momentarily lost sight of both suspects before he was informed by a employee of Perkin's Restaurant that the suspects were in the restaurant restroom. (T 84) Talley entered the restroom and recognized both suspects as the people he was previously chasing. (Id.) During the chase, one of the suspects had a black bag in hand, a bag Talley could not locate in the Perkin's restroom. (Id) After placing the Appellant, Keiandre Lovett and a co-defendant, in hand-cuffs, Talley re-traced his steps in an effort to find the black bag. (T 86-8) Talley received information from an anonymous source directing his attention to the back of a truck where he located the black bag containing a firearm. (Id) Talley testified Lovett was the person carrying the bag during the pursuit. (T 96-104, 121-2)

Law enforcement collected DNA evidence from a hat found near the truck, (T 158) and a curtain at the house. (T 166,174-5) DNA from both matched Mr. Lovett's. (T 192, 195) Inside the black bag was a firearm inside a soft case, (T 127, 157) and a receipt with Mr. Nieves's name. (T 159) Talley testified he recognized Lovett by the red shirt he was wearing, and that Lovett was the person running with the black bag. Talley did not testify when the burglary occurred, or how soon after the burglary he chased the two suspects.

C. Verdict

After the State presented their case, defense counsel moved for a judgment of acquittal on all counts, and renewed that motion at the close of all evidence. (T 205-15, 224; ROA 99-101) That motion was denied. (T 218, 225, 255) The jury returned verdicts of guilty on all counts. (T 330-1)

D. Post-verdict judgment of acquittal

At sentencing, defense counsel filed a written motion for judgment of acquittal. It was argued that there was insufficient evidence to support the jury's finding on count one that Lovette was in possession of a firearm during the commission of the burglary, including "flight after the commission" of the crime. (ROA 99-101) No person witnessed the burglary, or saw who handled the firearm during the commission of the burglary. (ROA 100) The two co-defendants were seen at 3:30 in the afternoon carrying a bag with a firearm, but there was no evidence presented that established when the burglary occurred. (ROA 100-1) The evidence presented was not inconsistent with the reasonable hypothesis that the burglary had been completed hours before the co-defendants were eventually spotted, safely walking in a separate neighborhood. (Id.) The trial court denied the motion. (R 135)

E. Sentence

At sentencing, the judge considered testimony from multiple witnesses, and noted:

> "The legislature has taken from the Court the control of what sentence I can impose. I do agree with defense counsel that probably an appropriate sentence in this case would be 57 months, based on what I have, but I don't have the ability to do that. The minimum sentence that the Court can impose from an imprisonment standpoint is a ten-year minimum mandatory."
>
> (ROA 187)

The judge went on to impose a 10-year sentence in the Department of Corrections, followed by 5 years probation. (ROA 187) A timely notice of appeal was filed (ROA 135) and this appeal follows.

SUMMARY OF ARGUMENT

Two individuals broke into a home and, during the incident, took a firearm. There were no witnesses to the burglary and no evidence as to who handled the firearm during the burglary. The State provided a 6-hour window when the burglary occurred, but no evidence as to when the burglary was completed. Without direct evidence as to when the burglary began or ended, the jury could not determine if Lovett was "in flight" after the commission of the burglary when he was identified with the bag containing the firearm. The jury returned a verdict of guilty on count one and additionally found that Lovett actually possessed a firearm. Defense filed a written motion for judgment of acquittal after the verdict. The motion argued that the testimony from the witnesses could not establish whether Lovett was “in flight” after the commission of the burglary. Therefore, the evidence was insufficient to establish this fact beyond a reasonable doubt. The trial court denied the motion and imposed a 10-year mandatory minimum on count one. This was error. In order to impose the mandatory minimum, there must be proof that Lovett was in flight after the commission of the burglary. Here, there was no such proof. The burglary could have been completed hours before the co-defendants were eventually spotted, walking safely in a different neighborhood. The judgment of acquittal should have been granted. The 10-year minimum mandatory imposed on count one must be reversed.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE DURING THE TRIAL, AND AFTER THE VERDICT.

This appeal focuses on the 10-year minimum mandatory for possession of a firearm that was imposed on count one, burglary of a dwelling with a firearm. A firearm was taken from the home during the incident. However, the testimony did not identify which of the two individuals possessed the gun during the burglary. More important, the testimony did not establish when the burglary was completed. The jury returned a special finding that Lovett actually possessed a firearm as to count one. Defense filed a written motion for judgment of acquittal after the verdict arguing that the testimony failed to establish whether Lovett and the co-defendant were "in flight" during the commission of the offense, or if the offense had been completed. The trial court denied the motion and this appeal follows.

The standard of review on appeal of a judgment of acquittal after a jury verdict is de novo. *State v. Tovar*, 110 So. 3d 33, 35 (Fla. 2d DCA 2013).

Section 775.087(2)(a) must be construed according to its plain meaning. *State v. Ross*, 447 So.2d 1382 (Fla. 4th DCA 1984). In *Williams v. State*, 502 So2d 1307 (Fla. 3d DCA 1987), that court noted a burglary "is not complete for all other purposes until the defendant reaches safety, and a defendant's crime may be

aggravated and his sentence may be enhanced based upon acts committed up until that point."

When Lovett and his co-defendant were located, they showed no signs of being in the commission of the burglary, or in flight after the commission of the burglary. There was no evidence to support the idea Lovett and his co-defendant had recently burglarized the Nieves's home. Instead, the evidence the jury heard pointed to the idea that the burglary had concluded much earlier in the day, many hours before the co-defendants were eventually seen safely walking.

The State presented evidence that the burglary took place between the hours of 9:30 a.m., when the family left their home for the day, and 3:30 p.m., when Nieves's daughter returned to the house after school. Around 3:30 that day, Detective Talley saw Lovett and the co-defendant walking - not running - in a different subdivision. This subdivision was not the subdivision where the Nieves family lived. So, Lovett was not seen running, or showing any physical signs of having recently fled an area. He and his co-defendant were not seen leaving the Nieves's home, or their driveway, or their neighborhood, or even their subdivision. Instead, he and his co-defendant are seen walking in a different neighborhood altogether. These undisputed facts support a hypothesis that these co-defendants had not recently committed a burglary but instead had committed the burglary much earlier that day as they were located in a different part of town, showing no

signs of fatigue.

When the State provides the jury with no evidence of when exactly the burglary had been initiated, the jury has no idea when the burglary was completed. Florida Statute 775. 087(2) addresses persons in possession of a firearm "during the commission of the offense," and the jury instruction allows for "commission" to include a person "in flight" after the commission of the offense. Logic dictates the words "in flight" must have some limitations. If the two had been located 12 hours later, or a day later, it would seem obvious that the offense of burglary had been completed, and that they were no longer "in flight." Here, Defense counsel never argued Lovett was not guilty of a burglary, only that there was no way for a jury to determine when - in a 6 hour time span - that burglary began and ended. Clearly, they were found a distance from the location of the burglary. But most importantly, the State provided no evidence establishing when exactly the burglary took place. The State only presented a window of approximately 6 hours during which the burglary could have occurred.

Without direct evidence to establish that Lovett and his co-defendant were in "direct flight" after the commission of the burglary, 775.087 (2) cannot apply. The

imposition of the 10-year mandatory minimum must be reversed on count one.

CONCLUSION

Based on the foregoing reasons and authorities stated herein, Lovett respectfully requests that this Honorable Court reverse the imposition of the 10-year mandatory minimum on count one, and remand for re-sentencing.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

s/ *Craig R. Atack*
CRAIG R. ATACK
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0025402
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
(386) 254-3758
Atack.craig@pd7.org

COUNSEL FOR APPELLANT

CERTIFICATE OF FONT

I HEREBY certify that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

DESIGNATION OF E-MAIL ADDRESS

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary) and atack.craig@pd7.org (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, crimappdab@myfloridalegal.com, and mailed to the Appellant on this 9th day of October, 2015.

s/ *Craig R. Atack*
CRAIG R. ATACK
ASSISTANT PUBLIC DEFENDER

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

EMILIO COREY ALLEN,

Appellant,

v. CASE NO. 5D19-2357

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT,
CITRUS COUNTY, FLORIDA.

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER

By: CRAIG R. ATACK
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0027450
444 SEABREEZE BLVD., SUITE 210
DAYTONA BEACH, FLORIDA 32118
(386) 254-3758
Atack.craig@pd7.org

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PRELIMINARY STATEMENT

In this brief, the following symbols will be used:

“R”	Original and Supplemental record on appeal.
“T”	Trial Transcript

STATEMENT OF THE CASE AND FACTS

Jurisdiction. This appeal is from final order adjudicating Appellant, Emilio Corey Allen, guilty and sentencing him to prison for 30 years. (T 128; R 209). The order appealed from was rendered by the Circuit Court for the Seventh Judicial Circuit (Citrus County). A timely Notice of Appeal was filed. (R 151)

Charges. The State Attorney charged Allen with (I) felony fleeing or attempting to elude (F2), and no valid drivers license (M2). (R 23)

Trial. On January 22, 2019, Citrus county deputy Michael Anger follows a speeding vehicle. (T 33; 59). Anger activates his lights and sirens after the vehicle makes an abrupt turn, but the vehicle does not slow down. (T 34-6) During the pursuit, Anger shines a spotlight inside the vehicle and immediately recognizes the driver to be Allen. (T 37-8; 61-2; 72) Unable to continue the chase, Anger deactivates his lights and sirens (T 39-40; 45; 60) and slowly goes in the direction where he last saw the vehicle. (T 40) Soon, Anger spots the vehicle, now vacant with the doors open, just a few blocks away from where the chase subsided, in fact, near Allen's home. (T 38-40; 67) Anger testified he saw a black male "running into a wooded line," (R 40; 64-5) but did not pursue "per the request of (my) lieutenant, who wanted me to immediately leave the area." (40-1)

"A short time" later, Anger receives a phone call referencing a suspicious vehicle in that same area. (T 41) He heads back in that direction and sees a white female driving the same car he was recently chasing. (T 41-2) Anger made contact with the driver and came to understand she was Allen's girlfriend. (T 41)

Weeks pass before Anger sees Allen's girlfriend driving a vehicle again, this time with Allen in the passenger seat. (T 43) Anger arrests Allen for fleeing on January 22nd, 2019 and confirms Allen did not possess a valid drivers license that night. (T 66-7)

Allen left the courthouse after the close of the State's evidence. (T 81) The trial court requested court personnel start looking for Allen before the parties began deliberating the jury instructions. (T 77-82) Once the court was convinced of Allen's absence, defense counsel moved for a continuance. (T 81) That motion was denied (Id.) and the State indicated their intention to comment on his disappearance during closing argument. (Id.) Lodging the only objection in the trial, Defense counsel told the trial court they objected to the State's intention to make such a comment, and the trial court overruled that motion. (T 81) In closing argument, the State said the following:

> "And look, he fled today. Just like he did on January 22nd. He's not here anymore. Why would he leave in the middle of trial? Why would he flee again? It's a consciousness of guilt, members of the jury, because he knew he did it."

(T 91-2)

Verdict, Adjudication, and Sentence. The jury found Allen guilty. (T 124). The court adjudicated Allen guilty. (T 128) At a sentencing hearing, the trial court considered a Pre-Sentence Investigation Report, and learned the State's plea offer was 48 months prison. (Sent. 202) The trial court found Allen to be a Habitual Offender (Sent. 199-200) and sentenced him to 30 years imprisonment on Count (I) and time-served on the remaining count. (Sent. 209).

During the proceeding, the trial court made the following comments to Allen:

> That's when the real grand theft charge - - and I was noting, as I looked through this, Mr. Allen, that so many of these were pled to, like, two years and four months, which is 28 months in the state prison. I was trying to figure out why. Because probably down in the Hillsborough County courthouse - - have you ever been to trial before? Probably not, right? You always pled out? Negotiated pleas? That kind of stuff? Did you go to trial?
>
> Because you got negotiated pleas all the way through this thing. Twenty-four months here. Twenty-four months there. Twenty-four months in federal custody. And a year and four days concurrent, different jail sentences like that, to your possession charge.
>
> **Hillsborough, you never got it. You never got it - - Hillsborough was trying to correct your behavior. Up here in Citrus County, we have a little more time to work on these files and look at these files and get to know the files a little bit better. We're not trying to change your conduct, Mr. Allen. We're not. We punish it.** You made the choices, pal. You decided to do this. Nobody forced you to do it.
>
> And it's for those reason that no good cause shows to exist - - you have been qualified as a habitual felony offender – that I hereby

> sentence you on Count One to 30 years - - 3-0 years - - in the Department of Corrections. Credit for all time served. (Emphasis added)

(ROA 208-9)

SUMMARY OF THE ARGUMENT

Point 1 - The State sought to comment on Allen's disappearance after the close of the evidence in their closing argument. Before closing argument, defense

counsel objected and the trial court overruled the objection. This was error.

Point 2 - The trial court's comments (1) could reasonably be construed as suggesting the court considered Appellant's county of residence in determining Allen's sentence, and (2) strongly resemble similar comments requiring reversal made in *Andrews v. State*. Since the record is incapable of proving this consideration did not affect the sentence, re-sentencing is required before a different judge.

POINT 1

THE TRIAL ERRED BY ALLOWING THE PROSECUTION TO COMMENT ON ALLEN'S ABSENCE DURING CLOSING ARGUMENT.

Standard of Review.

"A trial court has discretion in controlling opening and closing statements, and its decisions will not be overturned absent an abuse of discretion. We look at the closing argument as a whole to determine whether that discretion was abused." *Evans v. State*, 177 So. 3d 1219, 1234 (Fla. 2015) (quoting *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007). However, "[w]hile 'wide latitude is permitted in closing argument, ... this latitude does not extend to permit improper argument.' " *Rodriguez v. State*, 210 So. 3d 750, 756 (Fla. 5th DCA 2017) (quoting *Cardona v. State*, 185 So. 3d 514, 520 (Fla. 2016)).

Once the closing arguments at issue have been found to be improper, two applicable standards of review remain. First, "[f]or those closing arguments where the defense objected to improper comments and the trial court erroneously overruled Defense Counsel's objection, we apply a harmless error test." *Evans v. State*, 177 So. 3d 1219, 1234 (Fla. 2015).

Second, the Court also performs a parallel review of all of the improper comments - both objected-to and unobjected-to - for fundamental error. *Crew v. State*, 146 So. 3d 101, 111 (Fla. 5th DCA 2014); *Pacifico v. State*, 642 So. 2d 1178

(Fla. 1st DCA 1994); *Servis v. State*, 855 So. 2d 1190, 1197 (Fla. 5th DCA 2003). A review for fundamental error considers the cumulative impact of the prosecutor's comments on the fairness of the defendant's trial, and reversal on this ground is not barred by the presence of testimony which strongly suggests guilt. See *Caraballo v. State*, 762 So. 2d 542, 548 (Fla. 5th DCA 2000) (reversing due to prosecutor's improper closing argument despite lack of objection because "although the testimony strongly suggested guilt, the prosecutor overstepped his bounds"); cf. *Barnes v. State*, 58 So. 2d 157, 159 (Fla. 1951) (where "the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence, in such event a new trial should be awarded, regardless of the want of objection or exception.").

Argument.

Allen rejected a plea offer of 48 months imprisonment in favor of resolving his case by jury trial. The State presented one witness, Deputy Anger, whose testimony regarding his identification of Allen at night, inside a moving vehicle, was critical to the State obtaining a conviction. After the State rested, Allen left the courtroom and could not be found on the premises of the courthouse. No person spoke with Allen, or overheard him give a reason for his sudden disappearance. The trial court requested court personnel search the second floor (T 76; 78) and the bathrooms on the first floor (79-80) before he learned Allen was seen “walking,

but not moseying" down the stairwell. (T 80) At that point, the trial court declared: "The defendant has exited the courtroom. I don't know where he's at. Hopefully he comes back. " (T 81)

Outside the presence of the jury, the State indicated their intention to comment on Allen's absence, a proposition to which the defense objected. (T 81) Specifically, the trial court asked the defense: "He had no right to leave this trial?" and the defense responded "That is not relevant." (T 82)

Later, in their closing, the State told the jury:

> "And look, he fled today. Just like he did on January 22nd. He's not here anymore. Why would he leave in the middle of trial? Why would he flee again? It's a consciousness of guilt, members of the jury, because he knew he did it."

(T 91-2)

On the last day of trial in *Estopinan v. State*, 710 So. 2d 994, 995-96 (Fla. 2d DCA 1998), the appellant was not present and the trial court allowed the State to comment that his absence was an effort to avoid prosecution. The Second DCA found that decision by the trial court to be reversible error. "Evidence of flight is admissible as relevant to the defendant's consciousness of guilt where there is sufficient evidence that the defendant fled to avoid prosecution for the charged offense." See *Shellito v. State*, 701 So.2d 837 (Fla.1997); *Escobar v. State*, 699 So.2d 988 (Fla.1997).

In *Estopian*, that court found there was insufficient evidence to prove that appellant fled to avoid prosecution. Similarly, in the instant case, there is no evidence indicating the reason Allen left the courtroom was to avoid prosecution. It is possible Allen experienced any one of a multitude of emergencies requiring his presence that would take precedence over this otherwise consequential trial. More importantly, the trial court could have used its discretion to delay the trial a reasonable amount of time so as to ensure Allen did not return before its conclusion. Instead, after a cursory inquiry into two floors of the building, the trial court relied on someone's statement that Allen had left via the staircase. The trial court never called that person to inquire as to whether Allen made a statement that would substantiate the State's position: that he in fact left to avoid prosecution. Instead, the record is devoid of any evidence that could prove Allen fled to avoid prosecution.

In a trial such as Allen's, where the State presented just one witness, the prosecutions's improper comment on the reason Allen fled is all the more prejudicial. Since Allen's objection to this improper comment was overruled, the harmless error analysis applies. *Evans v. State*, 177 So. 3d 1219, 1231 (Fla. 2015) (citing *State v. DiGuilio*, 490 So. 2d 1129, 1135 (Fla. 1986). The harmless error analysis "places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the

verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 490 So. 2d 1129, 1135 (Fla. 1986). The State cannot do so here. No jury has ever considered fewer witnesses than the jury in Allen's trial. Allen's jury heard from just one witness, a witness upon whose credibility the State's entire case rested. If the jury doubted Deputy Anger could identify Allen while driving, during a split second, when flashing a spotlight inside a moving vehicle, the State would not have met their burden and jury could only have returned with a verdict of Not Guilty.

Remedy

By allowing the prosecution to augment Anger's refutable testimony with an improper and uninformed comment - namely, that the prosecution knows Allen fled "because he did it" when there was no evidence at all regarding why Allen fled - the trial court allowed an error that reasonably contributed to Allen's conviction. This Honorable Court should remand for a new trial.

POINT 2

THE TRIAL COURT'S COMMENTS PRIOR TO IMPOSING APPELLANT'S SENTENCE SUGGESTED THE SENTENCE WAS INFLUENCED IN PART BY APPELLANT'S OUT-OF-COUNTY RESIDENCY AND DID SO IN A MANNER STRONGLY RESEMBLING THOSE WHICH REQUIRED REVERSAL IN

ANDREWS V. STATE.

Preservation and Standard of Review

The consideration of an improper factor which violates fundamental constitutional rights does not require a contemporaneous objection for appellate review. *Martinez v. State* 123 So. 3d 701, 704 (Fla. 1st DCA 2013); see also, *Nawaz v. State*, 28 So. 3d 122 (Fla. 1st DCA 2010).

The "standard of review is de novo." *Cromartie v. State* 70 So. 3d 559, 563 (Fla. 2011). "Although an appellate court generally may not review a sentence that is within statutory limits under the Criminal Punishment Code, an exception exists, when the trial court considers constitutionally impermissible factors in imposing a sentence." *Nawaz v. State* 28 So. 3d 122, 124 (Fla. 1st DCA 2010) (citations omitted). Where such factors are considered, the defendant's due process rights are violated. *MacIntosh v. State*, 182 So. 3d 888 (Mem) (Fla. 5th DCA 2016).

Where portions of the record reflect the trial court may have relied upon impermissible sentencing factors, it is the State's burden to show the trial court did not so rely from the record. *Epprecht v. State*, 488 So. 2d 129, 130 (Fla. 3d DCA 1986). A sentence should be vacated where a trial judge's comments "could reasonably be construed to suggest that the trial judge based [the] sentence, at least in part," on a constitutionally impermissible factor. *Nawaz*, at 125; See also *Santisteban v. State*, 72 So. 3d 187, 198 (Fla. 4th DCA 2011); *Jackson v. State*, 39

So.3d 427, 428 (Fla. 1st DCA 2010).

Argument

In *Andrews v. State* 207 So. 3d 889 (Fla. 4th DCA 2017), the defendant - a Broward County resident - was convicted of an armed burglary in St. Lucie County, Florida. At sentencing, the trial court's comments indicated the defendant's out-of-county residence may have affected the defendant's sentence. On appeal, the District Court reversed, holding that a defendant's out-of-county residency was an improper sentencing consideration. *Andrews,* at 891; see also *Jackson v. State*, 364 Md. 192, 772 A.2d 273, 278 (2001) ("Simply stated, it is not permissible to base the severity of sentencing on where people live, have lived, or where they were raised.").

The comments at issue in *Andrews*, made immediately prior to imposing sentence, were as follows:

> I know Judge Bauer's had these pillowcase burglaries and he said, "You do not come into my circuit and do this." And ... the point being is that what you might get away with down in Broward we—we try to send a message up here to stay out of the Nineteenth Circuit, don't break into our homes, don't bring guns up here and punches and break into our homes because it's different up here. And that's why people move up here because they want to raise a place—raise their families in a place where they don't have people breaking in their homes. So it's a serious crime and ... it needs a proportionate punishment.

Andrews, 207 So. 3d 889, 890 (Fla. 4th DCA 2017).

Here, the trial court appeared to consider Allen's county of residence in

sentencing. The comments at issue in the instant case, made immediately prior to imposing sentence, strongly resemble those in *Andrews*:

> That's when the real grand theft charge - - and I was noting, as I looked through this, Mr. Allen, that so many of these were pled to, like, two years and four months, which is 28 months in the state prison**. I was trying to figure out why. Because probably down in the Hillsborough County courthouse** - - have you ever been to trial before? Probably not, right? You always pled out? Negotiated pleas? That kind of stuff? Did you go to trial?
>
> Because you got negotiated pleas all the way through this thing. Twenty-four months here. Twenty-four months there. Twenty-four months in federal custody. And a year and four days concurrent, different jail sentences like that, to your possession charge.
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> **Hillsborough, you never got it. You never got it - - Hillsborough was trying to correct your behavior. Up here in Citrus County, we have a little more time to work on these files and look at these files and get to know the files a little bit better. We're not trying to change your conduct, Mr. Allen. We're not. We punish it.** You made the choices, pal. You decided to do this. Nobody forced you to do it.
>
> And it's for those reason that no good cause shows to exist - - you have been qualified as a habitual felony offender – that I hereby sentence you on Count One to 30 years - - **3-0 years** - - in the Department of Corrections. Credit for all time served.

(ROA 208-9, emphasis added)

Remedy

As the only source of evidence in the trial, Deputy Anger essentially told the jury exactly what they learned before the trial began, before voir dire, when the judge read aloud the contents of the Information: Allen fled from law enforcement, in a vehicle, while law enforcement had activated both lights and sirens. There simply was nothing more to this one-witness case. Before imposing sentence, the

trial court was aware the State had offered to resolve the case with a plea offer of 48 months in Department of Corrections. Considering there were no new, atrocious facts exposed during this laconic trial, the trial court's decision to impose a 30 year sentence must be attributable, at least in part, to something besides the crime Allen committed.

The explanation for this disparity makes itself known, at least in part, in the trial court's comments about Allen hailing from Hillsborough county. These comments "could reasonably be construed to suggest that the trial judge based [the] sentence, at least in part," on Allen's prior residence in a different county; especially in light of their similarity to those in *Andrews*. While *Andrews* involved comments on the defendant's out-of-county residency at the time of the offense, and not the out-of-county residency prior to the offense at issue here, the impropriety is the same. If, in determining the length of a criminal sentence, it is impermissible to consider whether the defendant lived outside of the county at the time of the offense, *Andrews*, and if it is also impermissible to consider whether the defendant was born in another country, *Nawaz*, then it is equally impermissible to consider, as the court appeared to here, whether the defendant had ever lived outside of county. Therefore, Allen's sentence must be "reverse[d] and remand[ed] for resentencing before a different judge, who may not consider the defendant's out-of-county residency." *Andrews*, at 891.

CONCLUSION

BASED UPON the foregoing cases, authorities, and policies, the undersigned respectfully requests this Honorable Court reverse and remand for a new trial, or should the Court only agree with the argument made in Point 2 of this brief, remand Allen's case for re-sentencing before a different judge.

Respectfully submitted,

/s/ *Craig R. Atack*

Craig R. Atack
Assistant Public Defender
Florida Bar No. 0027450
444 Seabreeze Blvd., Suite 210
Daytona Beach, Florida 32118
(386) 254-3758
Atack.craig@pd7.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Fl 32118, crimappdab@myflorida.com, and mailed to Appellant on this 26th day of November, 2019.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(a)(2), Fla. R. App. P., in that it is set in 14-point Times New Roman font.

/s/ *Craig R. Atack*
Craig R. Atack
Florida Bar No. 0027450