

Application for Nomination to the 7th Circuit Court



Michele S. Simonsen

January 2024

APPLICATION FOR NOMINATION TO THE 7th 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: Michele Swanberg Simonsen

Social Security No.: [REDACTED]

Florida Bar No.: 0937878

Date Admitted to Practice in Florida: 5/31/1992

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.

7th Judicial Circuit State Attorney's Office
Managing Assistant State Attorney
251 North Ridgewood Avenue, Daytona Beach, FL 32114
386-239-7710

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.

[REDACTED] Volusia County
I have lived at this address for 25 years. I have lived in Florida for a total of 43 years.
My cell phone number is [REDACTED]. My preferred email address is: simonsenm@sao7.org.

3. State your birthdate and place of birth.

[REDACTED]; Omaha, Nebraska

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 1992; currently active
South Carolina Bar – admitted 1991; currently inactive
United States District Court for the District of South Carolina – admitted 1992; currently inactive
United States Court of Appeals for the Fourth Circuit – admitted 1993; currently inactive
United States District Court, Middle District of Florida – admitted 1998, but I did not practice in federal court in Florida

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

Michele Ann Swanberg 1966-1991
Michele Swanberg Nelson 1991-2009

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).

University of Florida College of Law January 1988-December 1990
Juris Doctorate, December 1990. My graduating GPA was 2.59. I do not know my class standing. I worked while I was in law school and was active in many organizations. I achieved Honors in Legal Research and Writing in the Spring of 1988.

University of Florida College of Liberal Arts & Sciences August 1984-December 1987
Bachelor of Arts in Sociology, December 1987
My graduating GPA was 3.15. I do not know my class standing.

Apopka High School – August 1981-June 1984
High school diploma, June 1984
I graduated 6th in my class which was the top 2%.

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.

University of Florida Moot Court Team – 1989-1990; Assistant Vice Chairman, 1990; Selected Outstanding Senior – Fall 1990
Robert Orseck Memorial Moot Court Competition – Selected Best Oral Advocate, Final Round, by the Florida Supreme Court – 1990
J. Braxton Craven Memorial Moot Court Competition Quarterfinalist, UNC Chapel Hill, NC – Spring 1990
John Marshall Bar Association – 1989-1990
Phi Delta Phi Legal Fraternity – 1989-1990
University of Florida Campus Diplomats – 1987
University of Florida Preview Orientation Staff – 1987
University of Florida Resident Assistant – 1986-1987
University of Florida Student Senate – 1985-1986; Judiciary Chairman – 1986
University of Florida Student Honor Court – 1986
Mortar Board Senior Honorary - 1987

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.

State Attorney's Office, 251 North Ridgewood Avenue, Daytona Beach, FL 32114, Assistant State Attorney; July 1998 – Present

Federal Public Defender's Office, 75 Beattie Place, #950, Greenville, SC 29601, Assistant Federal Public Defender; March 1993-June 1998

Thirteenth Circuit Solicitor's Office, 305 E. North Street, #325, Greenville, SC 29601, and 214 E. Main Street, Pickens, SC 29671, Assistant Solicitor; March 1991-March 1993

Ninth Circuit State Attorney's Office, 415 N. Orange Avenue, Orlando, FL 32801, Intern; Summer 1989

Law Firm of Turner and Griscti, 204 W. University Avenue, Gainesville, FL 32601, Law Clerk; September 1989-February 1991

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.

As a Managing Attorney at the State Attorney's Office, I am a member of the Executive Staff, and I supervise the domestic violence unit in our Daytona Beach Office. I currently handle the intake of felony and misdemeanor domestic violence cases on four criminal dockets before Judge Raul Zambrano, Judge Elizabeth Blackburn, Judge David Cromartie and Judge David Foxman. I meet with victims and witnesses, review evidence, and make charging decisions in felony and misdemeanor arrest and non-arrest domestic violence cases. I assist other attorneys in the office with domestic violence related issues and train law enforcement agencies in the Seventh Circuit. The client I serve is the State of Florida where my responsibility is to pursue justice and protect the safety of the public.

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: 2018 - 2023

	Court		Area of Practice	
Federal Appellate	_____ %		Civil	_____ 1 _____ %
Federal Trial	_____ %		Criminal	_____ 99 _____ %
Federal Other	_____ %		Family	_____ %
State Appellate	_____ %		Probate	_____ %
State Trial	_____ 100 _____ %		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: I currently spend most of my time in the office since my position involves making charging decisions in criminal cases. A couple of years ago, I spent more time in the courtroom than I currently do because I was handling cases from charging decision through disposition.

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

Jury?	_____ 10-12 _____	Non-jury?	_____ 12-15 _____
Arbitration?	_____ 0 _____	Administrative Bodies?	_____ 0 _____
Appellate?	_____ 1 _____		

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.

U.S. vs. Brinston Wilson, et al., U.S. Court of Appeals for the Fourth Circuit, Case Nos. 94-5242, 94-5244, 94-5250, Argued: November 4, 1994. Opposing counsel was David C. Stephens, Assistant United States Attorney, deceased. I have attached a copy of the unpublished opinion for this case. *See attached Exhibit A.*

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.*

a. State of Florida vs. Benjamin Rogers Davis, 2020 300831 CFDB

Attorneys for the State – Applicant and ASA Julie Ozburn, ozburnj@sao7.org, 386-239-7710

Defense Counsel – Vivian Williams, williavivian@gmail.com, 904-323-1260, and Alexis Nava-Martinez, nava.alexis@pd7.org, 386-822-5770

b. State of Florida vs. Peter Stites, 1998 031201 CFAES

Attorneys for the State – Applicant and Kip Miller, kip@millerdui.com, 386-872-7800

Defense Counsel – Steven DeLaroche, stevendelaroche@delaroche-law.com, 386-947-0909

c. U.S. vs. Ramona Tucker, 7:97-cr-095-HMH-1

Defense Counsel – Applicant and AFD Benjamin T. Stepp, benjamin_stepp@fd.org, 386-235-8714

AUSA – David C. Stephens, deceased

d. U.S. vs. Pamela Lavern Williams, 7:95-cr-01011-MBS-1

Defense Counsel – Applicant

AUSA – Harold W. Gowdy, III, treygowdy89@gmail.com, 864-809-0917

e. U.S. vs. Wong E. Jackson, 6:95-cr-01052-HMH-1

Defense Counsel – Applicant

AUSA – David C. Stephens, deceased

f. U.S. vs. Donald Cheatham, 6:94-cr-00771-WBT-1

Defense Counsel – Applicant

AUSAs – E. Jean Howard, retired, jeannehowardsc@yahoo.com, 864-241-0944

Harold W. Gowdy, III, treygowdy89@gmail.com, 864-809-0917

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.*

I have not participated as an attorney in a formal mediation. I have worked with a number of private attorneys and assistant public defenders, however, and we have resolved many cases short of trial. The Assistant Public Defenders I worked with when I was appearing in court regularly include: Jay Crocker, Ashley Gilger, and Mitch Novas, as well as the Public Defender, Matthew Metz. They can be reached at 386-239-7730.

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 appeared in court an average of twelve days per month from 2019 until the end of March of 2021. With covid, some of the court appearances were remote via Zoom. Since that time, I do not appear in court regularly because my responsibilities involve meeting with victims and witnesses, reviewing evidence, and making filing decisions in the office on four separate court dockets, both misdemeanor and felony. I have covered various hearings for other attorneys in my office while working as an intake attorney. I appeared in court most frequently between 1993 and 1998, when I represented clients charged with various crimes in federal court in South Carolina.

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.

- a. U.S. vs. Brinston Wilson, et al., U.S. Court of Appeals for the Fourth Circuit, Case Nos. 94-5242, 94-5244, 94-5250, Argued: November 4, 1994. U.S. vs. Calvin Jones, Terry Brice, and Brinston Wilson, U.S. District Court for the District of South Carolina, 7:92-cr-00328-HMH-3. Jury trial held November 17-18, 1993. The government was represented by Assistant United States Attorney David C. Stephens, deceased. I represented the defendant, Brinston Wilson. He had two codefendants at trial who were represented by William B. Long, Jr., blongjr@bellsouth.net, 864-242-8888, and Thomas G. Nessler, Jr., tnesslersccoast@gmail.com, no listed phone number in the South Carolina Bar directory. This was a complicated federal jury trial wherein multiple defendants were tried together on charges of conspiracy to possess with intent to distribute crack cocaine and use of a firearm in a drug trafficking offense. Our clients were convicted of the offenses at trial and sentenced to significant prison terms after contested sentencing hearings. We appealed the 5 convictions and sentences and went to Richmond, Virginia, almost a year after the trial, where we argued and lost before the Fourth Circuit Court of Appeals. This case is significant to me because it was the only case I ever handled from arraignment through oral argument on appeal.
- b. U.S. vs. Donald Cheatham, 6:94-cf-00771-WBT-1, U.S. District Court for the District of South Carolina, Judge William B. Traxler, Jr. Jury trial held August 28 and 29, 1995. The government was represented by Assistant United States Attorneys E. Jean Howard, retired, jeannehowardsc@yahoo.com, 864-241-0944, and Harold W. Gowdy, III, treygowdy89@gmail.com, 864-809-0917. My client was charged with constructive possession of a firearm by a convicted felon. The facts were stacked against us, and my client, who was serving a state prison sentence at the time I represented him, was passionate about his innocence. He was strong-willed and had firm ideas about how he wanted his case presented at trial. He expressed little to no confidence in me, as a lawyer with only four years of experience, to represent him at trial. We were able to work together, and he was acquitted of the charge on August 29, 1995, after a two day jury trial. This case is significant to me because it showed me that I can work with challenging people and still achieve favorable results.
- c. U.S. vs. Wong Jackson, 6:95-cr-01052-HMH-1, U.S. District Court for the District of South Carolina, Judge Henry M. Herlong, Jr. Jury trial held March 7, 1996. The government was represented by Assistant United States Attorney David C. Stephens, deceased. My client was charged with bank larceny after money was found missing from a bank which he cleaned after hours. I truly believed he was innocent of the charge, but I seriously questioned my ability to secure a not guilty verdict in the case. My client chose to testify at trial, and we took the judge and jurors to the bank to view the scene of the alleged crime for themselves. The jury acquitted him of the charge. This case is significant to me because I felt that I helped an innocent man avoid a wrongful conviction which could have had severely negative consequences in his life.
- d. McCue vs. Walker, 2006 20342 FMNS, Volusia County Family Court, Judge S. James Foxman. Indirect criminal contempt hearing held on May 31, 2006. Counsel for the

respondent was Nancy Ryan, Assistant Public Defender, ryan.nancy@pd7.org, 386-254-3758. The petitioner in this case filed two affidavits of violation of injunction alleging that the respondent made third party contact with her via email to a friend as well as sending text messages to the petitioner's phone. Both parties testified at the hearing. Judge Foxman found that the state did not prove a violation of the injunction through third party contact by email, but did find the respondent guilty of indirect criminal contempt for the text messages. The court sentenced the respondent to 60 days in jail. APD Nancy Ryan appealed the court's decision, and the 5th DCA reversed the court's finding of guilt. The 5th DCA found that the state did not present sufficient evidence to prove that the respondent was the person who sent the text messages to the petitioner. We did not have sufficient evidence to tie the respondent to the phone number from which the text messages were sent. Rather, the petitioner testified that the content of the text messages she received was unique to the respondent as opposed to coming from someone else. I respect the appellate court's decision, and it formulated a new threshold for me regarding sufficiency of evidence for pursuing or not pursuing cases. I have referred to this case many times over the years when talking with victims about why I cannot go forward in cases with similar facts.

e. State vs. Darryl Lorenzo Smith, 2019 306097 CFDB, Volusia County Circuit Court, Judge Sandra C. Upchurch. Stand your ground hearing held February 18, 2020. Assistant Public Defender Natalie Gossett, gossett.natalie@pd7.org, 386-254-3758, represented the defendant in this case. In November of 2019, I filed an information against the defendant charging him with aggravated battery – deadly weapon/great bodily harm, aggravated assault with a deadly weapon, battery, and resisting an officer without violence. The defendant struck his brother in law with a piece of wood which resulted in stitches and fractured ribs for the victim. The defendant also hit his sister, threatened her with a knife, and fled from officers. The defendant filed a motion to dismiss the charges based on Florida's statutory stand your ground doctrine, and after a contested hearing, the Court granted the motion in part and denied the motion in part. The defendant ultimately chose to enter a plea to all of the charges against him in exchange for a five year prison sentence. This case was significant to me because it was the only case in which I had to research and argue against a stand your ground motion.

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.

I have attached copies of three pleadings I prepared myself and filed in three separate cases in 1998, 2004, and 2020. My practice in recent years has not involved a significant amount of legal writing beyond charging documents and standard motions. *See attached Exhibit B.*

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.

Seventh Circuit Judicial Nominating Commission, September 2020
My name was certified to the Governor's Office for consideration.

Seventh Circuit Judicial Nominating Commission, September 2023
My name was certified to the Governor's Office for consideration.

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.

No.

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.

No.

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.

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.

N/A.

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.

Yes. From 2015 until 2019, I delivered flowers for the New Smyrna Beach Florist two or three times a year. I received the following compensation: 2015 - \$395; 2016 - \$600; 2017 - \$490; 2018 - \$505, and 2019 - \$300.

Since March of 2014, I have worked part time as a server for the Castaway Restaurant Group d/b/a the Lost Lagoon Wings & Grill restaurant in New Smyrna Beach. My gross compensation is as follows: 2014 - \$5,398.02; 2015 - \$10,435.90; 2016 - \$13,132.19; 2017 - \$15,558.65; 2018 - \$17,427.75; 2019 - \$12,446.15; 2020 - \$11,995.49; 2021 - \$18,736.93; 2022 - \$9,460.20, and 2023 – around \$3,000.00 year to date.

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.

None.

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.

I have created and contributed to the creation of several PowerPoint presentations used for training prosecutors and law enforcement agencies in the Seventh Judicial Circuit.

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.
- a. On September 30, 2021, I was a guest speaker at the Domestic Violence Basic Seminar sponsored by the Florida Prosecuting Attorneys' Association (FPAA) in Altamonte Springs, Florida. I gave a presentation on "Working with Civil Injunctions and Pretrial No Contact Orders". I have attached a copy of the agenda for this seminar. *See attached exhibit C.*
 - b. As part of a grant project with Daytona State College, I filmed two videos on domestic violence and stalking with Deb Cheslow of Deb Cheslow Consulting in Port Orange, Florida, called "Breaking the Cycle". They were filmed in 2017 and released in 2018.
<https://www.youtube.com/watch?reload=9&v=C-Fb8cxJYfs>
<https://www.youtube.com/watch?v=PWcY5g0JSXw>
 - c. In 2012 and 2013, I coordinated and presented at two community events, "Circuit 7 Domestic Violence Summit" on March 23, 2012, and April 5, 2013. Both events were held at the Calvary Christian Center in Ormond Beach, Florida. Both events involved lectures and interactive presentations for community partners and attendees to learn about various issues related to

domestic violence. I have attached links to media articles and brochures for both events. *See attached exhibit D.*

d. I have given many hours of training at the State Attorney's Office and to various law enforcement agencies and community agencies on domestic violence issues and report writing over the last ten years. My presentations have included training on collecting evidence, presenting evidence in court, investigating and building stronger cases for prosecution, and trauma based interviewing techniques to utilize when working with victims of crime.

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.

No.

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.

Daytona State College Campus Safety Wall of Fame – April 15, 2016

Allen Chapel A.M.E. Church Law Enforcement Day Community Service Award – April 10, 2016

State Attorney's Office Intake Top Gun Award – 2013, 2014, 2015

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.

Florida Bar – 1992 – Present

Volusia County Bar Association – 1998-1999 and 2021 – Present

Greenville County Bar Association (South Carolina) – 1994-1998

South Carolina Bar – 1991- Present, Inactive

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.

Board of Directors, Domestic Abuse Council, d/b/a The Beacon Center, Volusia County, Florida, Member from 2012-2018; Chairwoman, 2014-2015, Immediate Past Chairwoman, 2015-2016

Coronado Community United Methodist Church, Member since 1998; Staff Parish Relations Committee, 2015-2017, Communion Steward from 2018-2020. My husband and I led a team from our church for a week of mission work in San Ramon, Costa Rica, with Pura Vida Missions – Summers of 2013, 2014, 2015

The Oopsie Project Serving Central Florida Volunteer – 2022 – Present
The Federalist Society – 2020, 2023
Spruce Creek High School Volunteer – 2010-2019
City of New Smyrna Beach Parks and Recreation Volunteer Youth Soccer Coach – 2006-2008
Volunteer at Coronado Beach Elementary, Chisholm Elementary, and New Smyrna Beach Middle Schools – 2001-2013

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.

No.

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

As an Assistant State Attorney, my options for providing pro bono legal work have been limited. However, I have participated in a significant number of community and school events and have worked with a variety of organizations, as well as my church, to provide service to my community during the past 10 years as described in question 42 above.

45. Please describe any hobbies or other vocational interests.

I enjoy working in my yard, traveling, walking, spending time with my family, friends and dogs, and watching SEC college football.

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.

No.

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

Facebook: <https://www.facebook.com/michele.smonsens.56>

Twitter: @SimonsenMichele

LinkedIn: <https://www.linkedin.com/in/michele-simonsen-45378538/>

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 have been married to [REDACTED] a self employed owner of a Pepperidge Farm cookie and cracker route, since October 17, 2009.

Former spouse: John R. Nelson, 1811 Creekwater Blvd., Port Orange, FL 32128, 386-576-6183
Date of divorce: December 30, 2003, Volusia County, FL, case no. 2003-32327 FMCI

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], residential address: [REDACTED],

[REDACTED] residential address: [REDACTED]

[REDACTED] residential address: [REDACTED]

[REDACTED] residential address: [REDACTED]

[REDACTED], residential address: [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.

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.

Respondent in a dissolution of marriage case, Volusia County, FL, case no. 2003-32327 FMCI, finalized December 30, 2003

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.

Public service has always been a significant part of my life. I have spent most of my legal career as a prosecuting attorney, holding individuals accountable for their actions while also protecting the safety of the public. I have also worked as a federal defense attorney, representing individuals accused of crimes who could not afford to hire private counsel. I have experienced working in different states and in both the state and federal court systems. I have handled misdemeanor and felony criminal cases from both sides, as well as appellate issues, with some family court cases mixed in as well.

After graduating from law school in December of 1990, I moved to South Carolina where I successfully passed the South Carolina Bar exam in 1991. I worked as an Assistant Solicitor in Pickens and Greenville counties, prosecuting juvenile cases, representing the Department of Social Services in child abuse and neglect cases in family court, supervising and coordinating the office's

Magistrate and Municipal Court program, and prosecuting adult criminal cases in General Sessions Court. Since my parents lived in Florida, and I had graduated from law school in Florida, I wanted to take the Florida bar exam while the information was still somewhat fresh in my mind. I passed the Florida bar exam in 1992.

After two years with the Thirteenth Circuit Solicitor's Office, I accepted a position with the Federal Public Defender's Office in Greenville in 1993. From 1993 to 1998, I represented a multitude of clients charged with various federal criminal offenses. I gained invaluable experience by trying cases against experienced Assistant United States Attorneys. I also gained experience in legal writing by preparing my own motions and appellate briefs.

After five years as an Assistant Federal Public Defender, I relocated back to Florida in order to be closer to my family. I began my career as an Assistant State Attorney in 1998 under State Attorney John Tanner. I was assigned to the special prosecution unit where I handled mostly sex cases. By 2001, I had three small children, and I had transitioned to making charging decisions in misdemeanor domestic violence cases. I also prosecuted indirect criminal contempt cases in family court against respondents who were accused of violating injunctions.

For several years, I made the charging decisions in almost all of the misdemeanor domestic violence cases at the State Attorney's Office on the east side of Volusia County. The numbers grew to a caseload of over 2,000 cases a year. In 2016, State Attorney R.J. Larizza created a domestic violence unit and promoted me to the felony division to make charging decisions in all of the felony domestic violence cases on the eastside of Volusia County. In 2018, he expanded the felony domestic violence unit to hire another attorney to work on felony cases. We split the cases on four felony criminal dockets, so that we each handled cases from intake through disposition in front of two judges apiece. This experience proved to be very challenging.

In addition to my job as an Assistant State Attorney, I worked nights and weekends as a server in a restaurant for nine years. Both my daughters and my stepdaughter worked at the restaurant with me at various times, which has given us a close bond. This experience has helped me learn how to manage my time efficiently, how to work with people of varying personalities and challenges, and how to prioritize tasks, so I can balance my responsibilities to work and family successfully. I believe that my varied life and work experiences have prepared me well for a position as a Seventh Circuit Judge.

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 feel confident in my ability to manage a docket timely and efficiently and to treat litigants, attorneys, and other court personnel with respect. I attend court appearances on time, return phone calls and respond to emails in a timely fashion, and I work extremely hard. My prior experiences have enabled me to identify and narrow down issues that need to be addressed in a particular case, and I will continue to follow the law even when it means having to make an unpopular decision.

As a domestic violence prosecutor, I frequently have to make challenging decisions in cases that are not easy or well liked.

Mentoring younger and less experienced attorneys is something I enjoy about working at the State Attorney's Office. Being a Seventh Circuit Judge would allow me to continue to mentor and encourage younger and less experienced attorneys in our community. My reputation for honesty and integrity means a great deal to me, and I would hope to impart those qualities to the attorneys and litigants who would appear before me. Based on my past experience, I think the chances are good that I might see some litigants more than once, and they will remember how I treated them. It would be a privilege for me to continue my career in public service as a Seventh Circuit Judge.

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.
 - a. R.J. Larizza, Seventh Judicial Circuit State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, FL, 32114, larizzar@sao7.org; 386-239-7710
 - b. Judge Dawn D. Nichols, Circuit Judge, 101 N. Alabama Avenue, Deland, FL 32724, dnichols@circuit7.org, 386-822-5744
 - c. Judge Mary G. Jolley, Circuit Judge, Volusia County Courthouse Annex, 125 E. Orange Avenue, Room 304, Daytona Beach, FL 32114, mjolley@circuit7.org, 386-257-6091
 - d. Robert W. Lloyd, 6210 Shoreline Drive, Port Orange, FL 32127, rlloyd@rlloydlegal.com, 386-316-0888
 - e. Philip J. Bonamo, Partner, Rice Law Firm, 222 Seabreeze Boulevard, Daytona Beach, FL 32118, PBonamo@RiceLawFlorida.com, 386-257-1222
 - f. Judge Susanne Wilson Bullard, Alachua County Family Civil and Civil Justice Center, 201 East University Avenue, Room 305, Gainesville, FL 32601, bullards@circuit8.org, 352-264-7057
 - g. Benjamin T. Stepp, Assistant Federal Public Defender, 75 Beattie Place, Suite 950, Greenville, SC, 29601; benjamin_stepp@fd.org; 864-235-8714
 - h. Julie Ozburn, Assistant State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, FL 32114, ozburnj@sao7.org, 386-239-7710
 - i. Janice Simpson, Assistant State Attorney, 101 N. Alabama Avenue, Deland, FL 32724, simpsonj@sao7.org, 386-822-6400
 - j. Cyndi Ritchey, 122 Ponce De Leon Circle, Ponce Inlet, FL 32127, cyn6bud@gmail.com, 386-547-4364

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(1), 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 3rd day of January, 2024.

Michelle S. Simonson
Printed Name


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: \$125,287.02

Last Three Years: \$107,312.86 \$97,850.04 \$95,712.54

These figures represent my compensation from my employment at the State Attorney's Office for the years 2023, 2022, 2021 and 2020, in that order. They include health insurance which is part of my compensation package.

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: \$94,404.25

Last Three Years: \$80,990.30 \$74,098.48 \$74,050.48

These figures represent my compensation from my employment at the State Attorney's Office for the years 2023, 2022, 2021, and 2020, in that order, including health insurance which is part of my compensation package.

3. State the gross amount of income or losses 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: Around \$3,000

Last Three Years: \$9,460.20 \$18,736.93 \$11,995.49

The figures listed here came from my job as a server at the Lost Lagoon restaurant for the years 2023, 2022, 2021, and 2020.

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: Around \$2,000

Last Three Years: \$6,911.25 \$14,391.59 \$7,663.26

These figures represent net income from my job as a server at the Lost Lagoon restaurant for the years 2023, 2022, 2021, and 2020.

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: Around \$2,000

Last Three Years: \$6,911.25 \$14,391.59 \$7,663.26

Lost Lagoon restaurant wages

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 12/31, 2023 was \$1,063,146.77.

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 \$ 65,000

ASSETS INDIVIDUALLY VALUED AT OVER \$1,000:

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)

VALUE OF ASSET

Florida Retirement System Investment Funds	\$23,565.50
Bank of America/Merrill IRA	\$7,000.27
Residence located at [REDACTED]	\$925,000
Checking/savings accounts at Bank of America	\$40,000
Fidelity IRAs and investments	\$144,848
Schwab investments	\$16,733

PART C - LIABILITIES

LIABILITIES IN EXCESS OF \$1,000 (See instructions on page 4):

NAME AND ADDRESS OF CREDITOR

AMOUNT OF LIABILITY

Regions Mortgage, P.O. Box 2153, Dept. 2520, Birmingham, AL 35287-2520	\$131,500

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
7 th Judicial Circuit State Attorney's Office	251 N. Ridgewood Avenue, Daytona Beach, FL	\$107,312.86
Castaway Restaurant Group, LLC d/b/a Lost Lagoon Restaurant	2004 N. Dixie Freeway, NSB, FL	\$9,460.20

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 ENTITY	None		
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.

Michael J. ...
 SIGNATURE

STATE OF FLORIDA

COUNTY OF *Volusia*

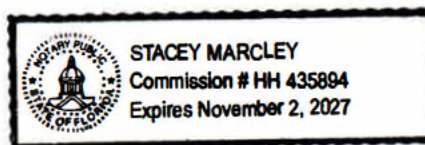
Sworn to (or affirmed) and subscribed before me this 2nd day of January, 2024 by _____

Stacey Marcle
 (Signature of Notary Public—State of Florida)

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

Personally Known OR Produced Identification _____

Type of Identification Produced _____



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: January 3, 2024

JNC Submitting To: Seventh Circuit Judicial Nominating Commission

Name (please print): Michelle S. Simonsen

Current Occupation: Attorney

Telephone Number: [REDACTED] Attorney No.: 0937878

Gender (check one): Male Female

Ethnic Origin (check one): White, non-Hispanic

Hispanic

Black

American Indian/Alaskan Native

Asian/Pacific Islander

County of Residence: Volusia

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.

Michele S. Simonsen

Printed Name of Applicant



Signature of Applicant

Date: January 3, 2024

Exhibit A

Question 13

Case argued before the U.S. Fourth Circuit
Court of Appeals

BTS MSN
save

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRINSTON WILSON,
Defendant-Appellant.

No. 94-5242

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TERRY LAMAR BRICE,
Defendant-Appellant.

No. 94-5244

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALONZO CALVIN JONES,
a/k/a Calvin A. Jones,
Defendant-Appellant.

No. 94-5250

Appeals from the United States District Court
for the District of South Carolina, at Spartanburg.
Henry M. Herlong, Jr., District Judge.
(CR-92-328)

Argued: November 4, 1994

Decided: December 23, 1994

Before ERVIN, Chief Judge, RUSSELL, Circuit Judge, and MACKENZIE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Michele Swanberg Nelson, Assistant Federal Public Defender, Greenville, South Carolina, for Appellant Wilson; William Banks Long, Jr., Greenville, South Carolina, for Appellant Brice; Thomas G. Nessler, Jr., Greenville, South Carolina, for Appellant Jones. David Calhoun Stephens, Assistant United States Attorney, Greenville, South Carolina, for Appellee. **ON BRIEF:** J. Preston Strom, Jr., United States Attorney, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Defendants-Appellants, Brinston Wilson, Terry Lamar Brice, and Alonzo Calvin Jones, appeal their convictions for conspiracy to possess with intent to distribute cocaine base in violation of 21 U.S.C. § 846(a)(1) (Count 1), and for possession of a weapon during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)

and 2 (Count 4). Counts 2 and 3 of the indictment were dismissed by the government before trial.

Defendants Brice and Wilson, on sufficiency of evidence grounds, charge that the district court erred in denying their motion for acquittal. All defendants claim that (1) the district court erred in finding the defendants were each accountable for between 150 grams and 500 grams of crack cocaine at sentencing; (2) the sentencing disparity prescribed by the Sentencing Guidelines between powder cocaine and crack cocaine constitutes a violation of the Eighth Amendment's proscription against cruel and unusual punishment; (3) the district court erred in applying the guideline offense level pertaining to crack cocaine without first making a proportionality determination on the Guideline disparity between cocaine powder and crack cocaine as a due process and fairness matter under the Fifth Amendment; and (4) the district court erred in its finding of the quantity of crack cocaine reasonably foreseeable and attributable to appellant Jones. Finding no error we affirm the district court.

I.

Brice and Wilson's challenge to the district court's denial of their motions for acquittal on evidentiary grounds is totally without merit. The motions, for the most part, were based on a charge of the lack of credibility of the government witnesses. These witnesses included police officers, co-conspirators, informants, undercover police officers. In addition, the government introduced audio tapes of conversations recorded at the time of purchases of crack cocaine. All of this evidence, including evidence that some of the witnesses had long criminal records and were themselves crack users, or had received some favorable treatment from government prosecutors, were weighed by the jury under proper instructions. The jury found the defendants guilty. This court reviews motions for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure by asking "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Mills*, 995 F.2d

480, 483 (4th Cir.), *cert. denied*, 114 S. Ct. 283 (1993). Given the lack of any real deficiency in the evidence, this court is bound by the credibility choices of the jury. *United States v. Arrington*, 719 F.2d 701, 704 (4th Cir. 1983), *cert. denied*, 465 U.S. 1028 (1984). The district court acted correctly in denying the motions of defendants for acquittal.

II.

Wilson and Brice also challenge their convictions for knowingly possessing a firearm in relation to a drug trafficking crime. The basis for the gun possession charge in count 4 against all three defendants is that when co-conspirator Jones was arrested at the S & S Cafe on October 21, 1991, a date within the time frame of the conspiracy, he had in his possession a loaded .45 caliber pistol and fifteen rocks of crack cocaine. There was other evidence that Brice sometimes carried a weapon during this conspiracy, but there was no evidence that Wilson did.

It has been determined that a defendant can be convicted of 18 U.S.C. § 924(c) under the conspiracy theory even if the defendant himself never possessed a weapon, if the act of a co-conspirator so armed was reasonably foreseeable. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946); *United States v. Cummings*, 937 F.2d 941, 944 (4th Cir.), *cert. denied*, 112 S. Ct. 395 (1991). The government presented evidence that Jones and Brice often carried guns during the time of this drug conspiracy and that Jones carried a .45 caliber automatic and Brice carried a .357 caliber revolver. These guns were observed on the persons of Jones and Brice when Wilson was with them in the narrow confines of automobiles and in the S & S Cafe. It was reasonably foreseeable to Wilson and Brice that their partner in this drug trafficking venture would be armed. The challenge to their conviction under 18 U.S.C. § 924(c) is without merit.

III.

At the sentencing hearing for all three defendants on March 15, 1994, the district court relied upon evidence taken at the trial,

evidence offered at the sentencing hearing and on a "Summary of Evidence Regarding Amounts" prepared by the government.

The probation officer in paragraph 9 of each of the three presentence reports, relying on information he obtained from the United States Attorney's file and ATF, concluded that each of the defendants was accountable for 1.615 kilograms of crack cocaine. The United States Attorney, on the other hand, conceded at sentencing that ". . . I feel much more comfortable submitting it with a range of 500 [grams] to one point five kilograms"

In making its determination that each of the defendants would be held accountable for 150 grams to 500 grams, the court used its discretion as it viewed the broad spectrum of evidence before it. Part of that evidence was the testimony of Earl Browning and Allen Browning, street dealers involved in the conspiracy with the defendants, that they sold about sixty-four grams of crack cocaine per week, and that Chris Simms, Joey Gist and numerous others were selling "probably the same amount or more." Even limiting the volume of crack cocaine flowing through the conspiracy at the rate indicated by the Brownings to the very short period of the conspiracy as alleged in Count 1, October 10, 1991 to October 21, 1991, the decision of the district court that the accountability of each of these three defendants was 150 grams to 500 grams was well within the range of the evidence to which the district court had access.

We review a district court's findings as to quantity of drugs attributable to a defendant only for clear error. *United States v. Williams*, 986 F.2d 86, 90 (4th Cir.), cert. denied, 113 S. Ct. (1993); *United States v. Mark*, 943 F.2d 444, 450 (4th Cir. 1991). We find no error here.

IV.

Defendants would find constitutional infirmities under the Eighth and Fifth Amendments on the disparate treatment afforded crack cocaine as against powder cocaine (1 to 100 ratio) by the Sentencing Guidelines. Defendants argue that heavy penalties exacted for crack cocaine as against the same quantity of powder cocaine is "cruel and unusual punishment" under the Eighth Amendment, and that due pro-

cess and fairness concepts inherent in the Fifth Amendment are similarly dislodged by this cocaine differential. As to the Fifth Amendment claim, defendants suggest a proportionality inquiry should have been made to examine whether the punishment fits the crime.

We answer all of these arguments in the negative. All of the circuits that have addressed the Eighth Amendment issue on whether the 100:1 ratio, powder cocaine to crack cocaine, promotes cruel and unusual punishment, have ruled to the contrary. *United States v. Wallace*, 22 F.3d 84 (4th Cir. 1994); *United States v. Fisher*, 22 F.3d 574, 579-80 (5th Cir.), *cert. denied*, 63 U.S.L.W. 3386 (1994); *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994); *United States v. Bynum*, 3 F.2d 769 (4th Cir. 1993); *United States v. Wesley*, 990 F.2d 360, 367 (8th Cir. 1993); *United States v. Pickett*, 941 F.2d 411, 419 (6th Cir. 1991); *United States v. Thomas*, 900 F.2d 37 (4th Cir. 1990); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989).

Likewise, the weight of authority is overwhelming that the statutes passed by Congress addressing this 100:1 ratio, and the regulations promulgated pursuant thereto, including the Sentencing Guidelines, are not arbitrary, discriminatory or irrational but are based on a proper legislative purpose, and therefore do not offend principles of due process as included in the Fifth Amendment, *United States v. Lawrence*, 951 F.2d 751, 755 (7th Cir. 1991); *Pickett*, 941 F.2d at 418; *Buckner*, 894 F.2d 975, 978-80 (8th Cir. 1990); *United States v. Francois*, 889 F.2d 1341, 1343 (4th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990).

Lastly, Courts have been nearly unanimous that sentences imposed under the Sentencing Guidelines for crimes involving crack cocaine are not disproportionate to the seriousness of the offense which Congress rationally concluded necessitated a particularly heavy penalty structure. *United States v. Johnson*, 944 F.2d 396, 407 (8th Cir.), *cert. denied*, 60 U.S.L.W. 3419 (1991); *Buckner*, 894 F.2d at 978-80; *Francois*, 889 F.2d at 1343.

The judgment of the district court is accordingly

AFFIRMED.

Exhibit B

Question 22 Writing Samples

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO: CRC 98-32383 CFAES

vs.

ALBERT STEPHENS, JR. /

**STATE'S TRAVERSE TO DEFENDANT'S MOTION TO DISMISS
PURSUANT TO FLA. R. CRIM. P. 3.190 (c)(4) AND STATE'S
RESPONSE TO DEFENDANT'S MOTION TO DISMISS ON OTHER GROUNDS**

COMES NOW, John Tanner, State Attorney for the Seventh Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney, and hereby files this Traverse to the defendant's Motion to Dismiss pursuant to Fla. R. Crim. P. 3.190 (b) and (c)(4) and State's Response to the defendant's Motion to Dismiss on other grounds.

FACTUAL ALLEGATIONS

1. Paragraph one of the defendant's motion is ADMITTED. However, the State amends the information to correct a typographical error in the minor's initials which should be A.L.D. rather than A.C.D.

2. Paragraph two of the defendant's motion is DENIED. The defendant's exhibit two was given to A.L.D. by the defendant even though it was not the actual questionnaire which A.L.D. completed. The defendant gave the questionnaire to A.L.D. and requested that she give it to a friend to complete. The defendant's exhibit two is not a complete copy of the survey which the State would submit at trial in that it leaves out the words "University of Central Florida" at the top of the first page and question 44 – "What do you like most about your private parts?" at the top of the second page. (See attachment.)

3. a) Paragraph 3a of the defendant's motion is ADMITTED insofar as A.L.D. testified that she knew and spoke to the defendant at church facilities but A.L.D. indicated that most of the time the defendant approached her to talk to her.

b) Paragraph 3b of the defendant's motion is ADMITTED insofar as questions were posed to A.L.D. in writing. However, the State asserts that A.L.D. filled out the survey only after the defendant deceived her by telling her he worked at a university and that the survey and response to it were associated with a class he taught there. A.L.D. stated that she probably felt a little bit of pressure, but thought it was okay to fill out the survey based on the defendant's representations that his college class had filled out the survey.

c) Paragraph 3c of the defendant's motion is ADMITTED in that A.L.D. testified in her deposition that she couldn't remember the defendant's having used bad language. However,

"bad" is not the standard by which the material is judged. The question of whether or not the survey and response thereto are obscene is to be decided by a jury, not the minor, A.L.D. The questionnaire and response thereto contain material which the State contends is obscene as defined by the statute.

d) Paragraph 3d of the defendant's motion is ADMITTED.

e) Paragraph 3e of the defendant's motion is ADMITTED.

f) Paragraph 3f of the defendant's motion is ADMITTED insofar as A.L.D. testified that the questions did not have any bad effect on her, but A.L.D. went on to say that she felt depressed, scared and frightened at the same time when the survey was discovered at her school.

g) Paragraph 3g of the defendant's motion is ADMITTED, but the State would add that A.L.D. said she didn't really feel anything negative when she read and answered the questionnaire because of the defendant's representation to her that he was doing it for his school.

h) Paragraph 3h of the defendant's motion is ADMITTED.

4. The State does not have sufficient information to admit or deny the allegations contained in paragraphs 4, 5, and 6 of the defendant's motion.

5. There are significant additional facts that the defendant fails to mention in his motion:

a) Prior to giving the questionnaire to A.L.D. at church to fill out, the defendant asked A.L.D. verbal questions including "do you like wet or dry kisses" and "what is your sexual fantasy?" outside the presence of others.

b) The defendant deceived A.L.D. by representing to her that he worked at a university and that the survey and response thereto were associated with a college class he was teaching. With the exception of a few questions, the survey A.L.D. received was the same as the defendant's exhibit two. The defendant distributed the survey and response thereto to A.L.D. outside the presence of others and told A.L.D. not to tell anyone about the survey he had given her. The defendant's contact with A.L.D. regarding the survey and response thereto was always on an individual basis rather than a distribution to all students in a particular class like the defendant's exhibit four. This conduct suggests that the defendant knew the content of the material he was distributing to A.L.D. and did not want it to be discovered. The defendant further perpetuated his scheme by showing A.L.D. three completed typewritten surveys which he said were filled out by girls in his college class although the ages of the girls who supposedly completed each survey were listed as 13, 14, and 15.

c) When A.L.D. was reading question #43 on the survey which asks "what do you like most about the male penis," the defendant said to her: "don't ask me what the last girl asked me." When A.L.D. looked at the defendant strangely in response, the defendant said: "the last girl asked me if she could see mine." And he said to her, "only if you look at it." He went on to say that the last girl pulled down his pants and looked at his penis.

d) The defendant kept A.L.D.'s completed survey after she filled it out. He gave her a letter (Defendant's exhibit one) which he had specifically addressed to her containing more obscene material. The defendant further deceived A.L.D. by telling her that his university class had given him positive feedback regarding A.L.D.'s answers to the survey.

e) The defendant gave A.L.D. another survey at church (defendant's exhibit two) and requested that she have one of her friends fill it out.

f) The only questions which A.L.D. did not remember or was not sure were on her survey compared to the questions contained on the defendant's exhibit two are the following questions:

- i. #49 – If you were married, would you fool around? Explain?
- ii. #33 – Where was it that you had your first sexual encounter?
- iii. #21 – Have you ever sunbathed in the nude?

g) When confronted about the survey by the pastor and elders of his church, the defendant first told them that the survey was from U.C.F. He then told the group that the survey was not an official survey from U.C.F., but was in fact made up by himself and a friend from California. When the pastor asked for the name and phone number of the friend in California, the Defendant said there really wasn't a friend in California, but rather the defendant himself had made it up.

6. In considering a motion to dismiss pursuant to Fla. R. Crim. P. 3.190(c)(4), the trial court must construe all evidence and inferences in a light most favorable to the State. Vanhoosen v. State, 469 So. 2d 230 (Fla. 1st DCA 1985); State v. Bonebright, 23 F.L.W. D1799, 1800 (July 29, 1998). Further, the trial court should not decide factual issues, determine the weight to be given conflicting evidence, or assess the credibility of witnesses. State v. Feagle, 600 So. 2d 1236 (Fla. 1st DCA 1992).

7. In this case, the material factual issues presented, to wit: whether the questionnaire and the defendant's use of it (a) appeal to the prurient interest, (b) are patently offensive, and (c) lack serious literary, artistic, political, or scientific value, are clearly in dispute. As such, these issues are ultimate issues of fact to be decided by the jury. See Graves v. State, 590 So. 2d 1007 (Fla. 3d DCA 1991) and State v. Duran, 550 So. 2d 45 (Fla. 3d DCA 1989). Therefore, the defendant's Motion to Dismiss pursuant to Fla. R. Crim. P. 3.190 (c)(4) should be denied because there are material factual issues in dispute and the State's evidence will constitute a prima facie case against the defendant.

LEGAL GROUNDS FOR MOTION TO DISMISS

FREE SPEECH (FEDERAL/STATE)

7. While the First and Fourteenth Amendments to the U.S. Constitution guarantee individuals certain freedoms, including the freedom of speech, the U.S. Supreme Court has determined that obscene material is not protected by the First Amendment. Roth v. United

States, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957); Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973). In Miller, the Supreme Court held that the First Amendment standards to be used by states in determining whether material was obscene and subject to regulation were: (1) whether the average person, applying contemporary community standards, would find that the material, taken as a whole, appealed to the prurient interest in sex; (2) whether the material portrayed, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the material, taken as a whole, did not have serious literary, artistic, political, or scientific value. Miller, 413 U.S. at 23-25. The Court specifically rejected any requirement that the materials be shown to be “utterly without redeeming social value.” Id. at 24-25. Because the Florida legislature followed the Miller standards in enacting Fla. Stat. s. 847.0133, the distribution of “obscene” material to minors which is prohibited by the statute is not entitled to First Amendment protection.

8. The fact that the survey and response in this case do not contain graphic pictures or images likewise does not entitle them to First Amendment protection since they otherwise contain obscene material. In Kaplan v. California, 413 U.S. 115, 118-120 (1973), the U.S. Supreme Court specifically found that expression by words alone could be legally obscene when the Court held that a book without any pictures but which contained obscene material was not entitled to First Amendment protection.

9. Like its federal counterpart, the Florida Supreme Court has held that obscenity is not protected by constitutional guaranties of freedom of speech and that Florida can regulate obscenity without unconstitutionally impairing an individual’s freedom of speech. Johnson v. State, 351 So.2d 10 (Fla. 1977); Tracey v. State, 130 So.2d 605 (Fla. 1961).

10. The free speech rights of the defendant in the case at bar are not violated by his prosecution under the instant statute since he is only prohibited from distributing “obscene” material as it has been defined in accordance with the holdings of the U.S. and Florida Supreme Courts.

VAGUENESS AND OVERBREADTH

11. The defendant asserts generally that Fla. Stat. s. 847.0133 is unconstitutionally overbroad and vague, but does not specify how the statute fails to “clearly articulate boundaries between expressions that are protected and those that are not”. Similarly, the defendant does not specify how the statute “as facially drawn does punish, chill and restrict protected speech, as well as unprotected speech, by other innocent parties, and does punish protected speech of the defendant as applied in the instant cause.” (defendant’s paragraph 13). When considering the constitutionality of a statute in the context of free speech and expression issues, the overbreadth doctrine is an unusual remedy which must be used sparingly, especially when the statute at issue is primarily intended to regulate conduct rather than pure speech. Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973); Schmitt v. State, 590 So.2d 404, 412 (1991); Art. I, Sec. 4, Fla. Const.

12. The U.S. Supreme Court has recognized that because of the state's interest in protecting the welfare of its children, its power to control the conduct of children extends beyond

the scope of its authority over adults. Carey v. Population Services International, 431 U.S. 678, 97 S. Ct. 2010, 52 L.Ed.2d 675 (1977). States have long denied minors access to certain establishments frequented by adults and have also denied minors access to speech deemed "harmful" to them. The Supreme Court has specifically found that states have an interest in the well-being of minors, and therefore, may regulate the sale or distribution to minors of sexually oriented materials. Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968), reh. den. 391 U.S. 971, 88 S. Ct. 2029, 20 L.Ed.2d 887; Miller v. California, 413 U.S. 15 (1973).

13. Although the constitutionality of Fla. Stat. s. 847.0133 has not yet been challenged at the appellate level, two other Florida statutes which restrict certain conduct associated with obscene materials and minors have been upheld as constitutional. Specifically, Fla. Stat. s. 847.011, prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty, has repeatedly been found constitutional by the Florida Supreme Court. See Sardiello v. State, 394 So.2d 1016 (1981); Paris Follies, Inc. v. State ex rel. Gerstein, App., 259 So.2d 532 (1972); Mitchum v. State, App., 251 So.2d 298 (1971); Johnson v. State, 351 So.2d 10 (1977). Likewise, the Florida Supreme Court has upheld the constitutionality of Fla. Stat. s. 847.013, exposing minors to harmful motion pictures, exhibitions, shows, presentations, or representations. Davison v. State, 288 So.2d 483 (1973), application denied 94 S. Ct. 1463, 415 U.S. 943, 39 L.Ed.2d 560.

14. Because Fla. Stat. s. 847.0133 employs the same definition of obscenity as Fla. Stat. s. 847.011 and s. 847.013, and follows the mandate of the U.S. Supreme Court, it comes to this Court clothed in a presumption of constitutionality.

DUE PROCESS

15. Due process requires a criminal statute's prohibition against certain conduct to be rationally related to its purpose so that it does not criminalize activity that is otherwise inherently innocent. State v. Walker, 444 So.2d 1137, 1140 (Fla. 2d DCA), affirmed & adopted, 461 So.2d 108 (Fla. 1984). In Ginsberg v. New York, the Supreme Court suggested that it only needed to find "that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors" in order to sustain a state's power to exclude material defined as "obscene". Ginsberg, 390 U.S. at 639. The statute at issue in the instant case which prohibits the distribution of obscene material to minors has a rational relation to the objective of safeguarding minors from harm. Therefore, Fla. Stat. s. 847.0133 does not violate the defendant's right to due process under the Fourteenth Amendment.

PRIVACY

16. A state's power to regulate obscenity "does not extend to mere possession by the individual in the privacy of his own home." Stanley v. Georgia, 394 U.S. 557, 568, 89 S. Ct. 1243, 22 L.Ed.2d 542 (1969). The U.S. Supreme Court has cautioned, however, that the Stanley decision should not be read too broadly and has specifically stated "that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others." United States v. 12 200-Foot Reels of Super 8mm Film, 413 U.S. 123, 93 S. Ct. 2665, 37 L.Ed.2d 500 (1973).

17. Florida's right to privacy is broader than the federal right. However, the Florida Supreme Court has found "no indication that the drafters of article I, section 23 meant to broaden the right of privacy as it relates to obscene materials..." Stall v. State, 570 So.2d 257, 262 (Fla. 1990). Fla. Stat. s. 847.0133 would not prohibit the defendant in this case from possessing the survey and response thereto in his own home for his own private use, but it does prohibit his act of giving the survey and response to A.L.D. at church. The State contends that there is no legitimate reasonable expectation of privacy in being able to distribute obscene materials to minors and that the statute in this case is a reasonable exercise of legislative power.

18. Taking the totality of the facts in the light most favorable to the State, the material facts are in dispute. The statute on its face and as applied in this case is constitutional. Furthermore, the average person, applying contemporary community standards, would find that the survey and/or response thereto are obscene because, taken as a whole, they appeal to the prurient interest; they depict or describe, in a patently offensive way, sexual conduct as specifically defined in Fla. Stat. 847.001; and they lack serious literary, artistic, political, or scientific value.

WHEREFORE, as there are disputed issues of fact in the instant case, the State of Florida respectfully requests that the defendant's Motion to Dismiss be DENIED.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by mail to: James D. Crock, P.A., 444 Seabreeze Blvd., Suite 650, Daytona Beach, FL, 32118, this _____ day of December, 1998.

MICHELE S. NELSON
ASSISTANT STATE ATTORNEY
251 N. RIDGEWOOD AVENUE
DAYTONA BEACH, FL 32114
FLA. BAR. NO. 0937878

COUNTY OF VOLUSIA

STATE OF FLORIDA

Personally appeared before me, Michele S. Nelson, Assistant State Attorney for the Seventh Judicial Circuit of the State of Florida, known to me to be the foregoing prosecuting

officer, who being duly sworn, says that the allegations set forth in the foregoing Traverse and Demurrer are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged. Subscribed in good faith.

Sworn to and subscribed before me this _____ day of December, 1998.

Filed with the Clerk of Court
Seventh Judicial Circuit, in and
for Volusia County, Florida, on
the _____ day of December, 1998.

Notary Public At Large
State of Florida (Seal)

My Commission Expires:

DIANA LYNN CHIARELLO,
Petitioner,

vs.

MICHELE CHIARELLO,
Respondent.

IN THE CIRCUIT COURT FOR THE SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

Case No: 2003-35054 FMCI

**MEMORANDUM OF LAW REGARDING NATURE OF CONTEMPT PROCEEDING
IN FAMILY COURT AND POTENTIAL SENTENCE WHICH RESPONDENT FACES
IF FOUND GUILTY OF INDIRECT CRIMINAL CONTEMPT**

COMES NOW, the undersigned Assistant State Attorney, after certain issues were raised at Respondent's arraignment on February 27, 2004, and herein provides this Memorandum of Law and states as follows:

1. Respondent was arraigned on a charge of contempt of court by the Honorable Frank Marriott on February 27, 2004, for allegedly violating a domestic violence injunction as described in Petitioner's affidavit filed February 6, 2004. Attorney Barry Hughes appeared on behalf of Respondent and Assistant State Attorney Michele Nelson appeared on behalf of the State of Florida and Petitioner. The Court advised Respondent that Petitioner's claim was civil in nature and that Respondent faced a maximum sentence of 59 days in jail if he were found guilty of contempt of court. The matter has been set for a contested order to show cause hearing on March 16, 2004, at 1:30 p.m. The State of Florida argues that Respondent faces prosecution for indirect criminal contempt as defined in Florida Rule of Criminal Procedure 3.840 and that the maximum penalty he faces if found guilty of willfully violating the injunction is six months' imprisonment and/or a fine.

2. The purpose of civil contempt proceedings is to compel action or inaction, whereas criminal contempt proceedings were created to punish conduct which violates a court order.

Deter v. Deter, 353 So.2d 614, 617 (Fla. 4th DCA 1977); In re S.L.T., 180 So.2d 374, 378 (Fla. 2d DCA 1965); Satterfield v. Satterfield, 39 So.2d 72, 74 (Fla. 1949).

3. In the present case, Petitioner has alleged that Respondent violated the injunction by having indirect contact with her through a third party on February 6, 2004, in violation of the no contact provision, paragraph 2, in the injunction. The Legislature's intent is that domestic violence be treated as a criminal act rather than a private matter. § 741.2901(2), Fla. Stat. (2003). For this reason, the Legislature has advised that enforcing compliance with injunctions for protection is to be done by way of criminal prosecution or indirect criminal contempt.

Id. While criminal prosecution is the favored method of enforcing compliance with injunctions for protection against domestic violence, the State can also choose to proceed by way of indirect criminal contempt pursuant to Rule 3.840, which it has elected to do in this case. Several courts have utilized indirect criminal contempt as a method of handling domestic and repeat violence injunction violations. See State v. Johnson, 676 So.2d 408 (Fla. 1996); Brown v. State, 595 So.2d 259 (5th DCA 1992); Tide v. State, 804 So.2d 412 (4th DCA 2001); Walker v. Bentley, 660 So.2d 313 (2d DCA 1995). The State suggests that civil contempt proceedings should be reserved for violations of the injunction such as failure to enroll in a batterer's intervention program or failure to comply with a visitation schedule which are not specifically enumerated in §741.31(4)(a)(1) – (8) of the Florida Statutes.

4. Having chosen to proceed in this case by way of indirect criminal contempt, the State suggests that the next issue before the Court is the possible sentence Respondent faces if the Court finds him in willful violation of the injunction. Florida Rule of Criminal Procedure 3.840(g) does not specify the sentence that an individual convicted of contempt can receive. However, the Florida Supreme Court has found that a judge may impose a sentence of up to six

months' imprisonment for indirect criminal contempt if the judge is the trier of law and facts and more than six months' imprisonment if he empanels a jury to try the facts or if the individual waives his right to trial by jury. Aaron v. State, 284 So.2d 673, 676-677 (Fla.1973).

5. Accordingly, if this Court should find that Respondent has willfully violated the domestic violence injunction by engaging in indirect contact through a third party with Petitioner, this Court should hold him in indirect contempt of court and may sentence him to a fine and/or imprisonment of up to six months.

I HEREBY CERTIFY that a copy of the foregoing was delivered to Barry Hughes, Attorney for Respondent, 2001 S. Ridgewood Ave., South Daytona, FL 32119, on this _____ day of _____, 2004.

JOHN TANNER, State Attorney

By: MICHELE S. NELSON
Assistant State Attorney
Fla. Bar No. 0937878
250 N. Beach St.
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO: 2019 304568 CFDB

STATE OF FLORIDA

VS.

JOSHUA DALE LUCAS,
DEFENDANT.

_____ /

STATE'S THIRD MOTION TO REVOKE BOND

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and pursuant to Fla. Statute 903.0471, hereby moves this Honorable Court to revoke the present bond of the defendant because there is probable cause to believe the defendant committed a new offense while on pretrial release in this case. Specifically, the State would show:

1. The defendant was arrested on August 6, 2019, on charges of aggravated battery with a deadly weapon and battery. He posted a surety bond of \$11,000 and was released from custody on August 7, 2019. He was ordered not to possess any weapons or firearms as a condition of his release. The State filed an information charging the defendant with aggravated battery with a deadly weapon and felony battery, one prior, on August 26, 2019.

2. On November 18, 2019, the defendant was arrested on charges of aggravated battery with a deadly weapon and aggravated assault with a deadly weapon in case no. 2019 306578 CFDB. The State filed a Motion to Revoke Bond in this case on November 19, 2019, based on the defendant's arrest on new criminal charges. Judge Upchurch signed an Order revoking the defendant's bond on November 20, 2019, at 3:45 pm. The defendant had already bonded out of custody on November 20, 2019, at 3:34 pm.

3. The State filed a no information in the new case, 2019 306578 CFDB, on March 3, 2020. The defendant's attorney filed a Motion to Set Aside the Warrant from November 20, 2019, based on the no information having been filed in the case. The State did not object to the defendant's motion, and the Court granted the Motion to Set Aside the Warrant on May 4, 2020.

4. On May 8, 2020, the defendant was arrested on new charges of sale/possession with intent to sell a controlled substance – 2 counts, grand theft/firearm, possession of a weapon/ammunition by a convicted felon, habitual driving while license suspended, resisting an officer without violence, fleeing and eluding/lights and sirens active and reckless driving. See case numbers 2020 302339 CFDB and 2020 302340 CFDB. The State filed a Motion to Revoke

the Defendant's Bond on May 8, 2020, which was granted, and the defendant was held in custody with no bond.

4. On June 8, 2020, the Court held a bond hearing in this case on the defendant's motion for bond reduction and set the defendant's bond at \$22,000. The defendant posted the surety bond of \$22,000 on June 9, 2020, and was released from custody on that date.

6. The defendant has now been arrested again on felony charges on July 29, 2020, while out on pretrial release in this case. The defendant was arrested by the Port Orange Police Department on charges of fleeing/attempting to elude, possession of a schedule II substance with intent to sell, possession of cannabis with intent to sell, DWLSR habitual offender and possession of drug paraphernalia. See case no. 2020 303703 CFDB. He posted a \$15,000 bond prior to his first appearance which is scheduled for today, July 30, 2020, at 1:30 pm.

WHEREFORE, the State of Florida respectfully requests this Court enter an Order revoking the defendant's bond after he is alleged to have committed a new criminal offense while on pretrial release in this case.

R.J. LARIZZA
STATE ATTORNEY

By: s/MICHELE S SIMONSEN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0937878
ESERVICEVOLUSIA@SAO7.ORG

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to G. KIPLING MILLER, 400 NORTH HALIFAX AVENUE, DAYTONA BEACH, FL 32118, on July 30, 2020.

s/MICHELE S SIMONSEN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0937878
251 N RIDGEWOOD AVENUE
DAYTONA BEACH, FL 32114
(386) 239-7710

Exhibit C

Question 37a

Agenda from FPAA Domestic Violence Basic
Seminar where I presented on

“Working with Civil Injunctions and Pretrial No
Contact Orders”

September 30, 2021

Domestic Violence Basic



September 30 – October 1, 2021

Embassy Suites Orlando North
225 Shorecrest Drive, Altamonte Springs, FL 32701

Education Chair: Teresa A. Hall, Supervising ASA, SAO 13 • Course Manager: Garrett M. Berman, ED, FPAA

VAWA Grant Manager: Christina S. Ard, FPAA • Administrative Asst: Michelle R. Logsdon, FPAA

THURSDAY, SEPTEMBER 30, 2021			
Min.	Time	Topic	Speaker
	8:30 a.m.	Registration Begins	
75	9:00 a.m.	Basics of Domestic Violence – Common Charges and Defenses	Katelyn Johnston, ASA SAO 4 – Jacksonville
	10:15 a.m.	Break – 10 Min.	
50	10:25 a.m.	Working with Civil Injunctions and Pretrial No-Contact Orders	Michele Simonsen, ASA SAO 7 – Daytona Beach
	11:15 a.m.	Break – 10 Min.	
50	11:25 a.m.	Dealing with Uncooperative Victims/Witnesses	Amy Moore, ASA SAO 18 – Sanford
	12:15 p.m.	Lunch	
75	1:45 p.m.	Using Electronic Evidence	Aaron Hubbard, ASA SAO 13 – Tampa
	3:00 p.m.	Break – 10 Min.	
50	3:10 p.m.	Common Hearsay and Confrontation Issues	Jonathan Olson, ASA SAO 5 – Tavares
	4:00 p.m.	Adjourn for the Day	
FRIDAY, OCTOBER 1, 2021			
Min.	Time	Topic	Speaker
60	9:00 a.m.	Use of Williams Rule Evidence / Forfeiture by Wrongdoing	Brice Van Elswyk, ASA SAO 12 – Bradenton
	10:00 a.m.	Break – 10 Min.	
50	10:10 a.m.	Jury Selection in Domestic Violence	David Whateley, ASA SAO 18 – Sanford
	11:00 a.m.	Break – 10 Min.	
50	11:10 a.m.	Stalking Cases	Jonathon Libby, ASA SAO 19 – Fort Pierce
	12:00 p.m.	Adjourn	
460 / 50 min = 9.2 Hours General CLE Credits			

While FPAA will abide by all local mask mandates and safety regulations, we do encourage and request all seminar attendees wear a mask while inside the training room for everyone's safety.

Thank you for your cooperation and understanding!

Exhibit D

Question 37b
Links to Media Articles and Brochures for
“Circuit 7 Domestic Violence Summit”
on March 23, 2012
and April 5, 2013

<https://flaglerlive.com/36015/domestic-violence-summit/>

<https://www.headlinesurfer.com/content/411775-state-attorney-rj-larizza-lead-domestic-violence-summit-friday-ormond-beach>

<https://flaglerlive.com/52768/domestic-abuse-flagler/>

Friday, March 23, 2012
Calvary Christian Center
Ormond Beach, Florida



**2012 Circuit 7
Domestic Violence
Summit**

2012 Circuit 7 Domestic Violence Summit

Featured Workshops:

“Walking In Her Shoes”

This workshop is an interactive educational experience that demonstrates the complex ways in which resources impact domestic violence survivors and their children. Participants move, do, think and experience the lives of domestic violence survivors.

Presented by:

Cheryl Fuller, Chief Executive Officer for the Domestic Abuse Council, Inc.

Darlene Wolfson, Director of Programs for the Domestic Abuse Council, Inc.

Child Welfare and Domestic Violence Issues

The workshop is designed for child welfare professionals and domestic violence advocates to understand their respective views and approaches to the complex dynamics involved with families struggling with domestic violence. We will explore how teamwork and ongoing readiness to communicate and collaborate with the families and other professionals is a cornerstone of comprehension and advocacy.

Presented by:

Pamela E. Aeppel, MA, Program Coordinator with imPACT, a training and consultation program with USF under the USF Training Consortium.

Effective Investigations/Evidence for Court

This workshop is designed to better prepare law enforcement officers, prosecutors, and other community agency representatives who work in the field of domestic violence with investigating and prosecuting domestic violence cases. We will explore evidence-gathering and legal issues in the context of how to build cases that can be successfully prosecuted in court.

Presented By:

R.J. Larizza, State Attorney for the Seventh Judicial Circuit

Michele Simonsen, Assistant State Attorney for the 7th Judicial Circuit



the cycle **CAN** be broken



Domestic violence is the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior perpetrated by an intimate partner against another. It is an epidemic affecting individuals in every community, regardless of age, economic status, race, religion, nationality or educational background. Violence against women is often accompanied by emotionally abusive and controlling behavior, and thus is part of a systematic pattern of dominance and control. Domestic violence results in physical injury, psychological trauma, and sometimes death. The consequences of domestic violence can cross generations and truly last a lifetime.

Summit Agenda

8:30 - 9:15 a.m.

Registration and Coffee

9:15 - 9:45 a.m.

Opening Remarks/ Introductions

10:00 - 11:45 a.m.

Workshop A1 - "Walking in Her Shoes"

10:00 - 11:45 a.m.

Workshop B1 - Child Welfare and Domestic Violence Issues

10:00 - 11:45 a.m.

Workshop C1 - Effective Investigations/ Evidence for Court

12:00 - 1:00 p.m.

Lunch

1:00 - 2:45 p.m.

Workshop A2 - "Walking in Her Shoes"

1:00 - 2:45 p.m.

Workshop B2 - Effective Investigations/ Evidence for Court

1:00 - 2:45 p.m.

Workshop C2 - Child Welfare and Domestic Violence Issues

3:00 - 3:30 p.m.

Closing Remarks

Summit Information

How to Register

Register Online by visiting:

www.communitypartnershipforchildren.org

If you have questions or need assistance with registering, please call (386)254-3796.

Participation is **free** for all law enforcement, child welfare professionals, social work and domestic abuse professionals. Refreshments and lunch will be provided.

Calvary Christian Center is located at :

1687 W. Granada Blvd.
Ormond Beach, FL 32174

One block west of I-95 (exit 268)
on Granada Blvd. (Hwy. 40)

From I-4, merge into I-95 North
From I-95, take exit 268, go
west to first light, turn right onto
property.

Summit Presented By:

*Circuit 7 State Attorney's Office
Florida Department of Children and
Families
Community Partnership for Children,
Inc.*

*Domestic Abuse Council, Inc.
Family Life Center
University of South Florida
University of Central Florida
Calvary Christian Center*

Sponsored by:

*Volusia County Sheriff's Office
St. Johns County Sheriff's Office
Flagler County Sheriff's Office*

2013 Circuit 7 Domestic Violence Summit



**Friday, April 5, 2013
Calvary Christian Center
Ormond Beach, Florida**

2013 Circuit 7 Domestic Violence Summit

Featured Topics:

“Walking In Her Shoes”

This presentation is an interactive educational experience which demonstrates the complex ways in which resources impact domestic violence survivors and their children. Participants move, do, think and experience the lives of domestic violence survivors.

Presented by:

Darlene Wolfson, Director of Programs for the Domestic Abuse Council, Inc.

Children, Family and Domestic Violence Issues

This presentation will explore injunctions, family court issues, a unified court system, and other issues involved in the complex dynamics of families struggling with domestic violence issues.

Presented by:

Shawn Nelson, Department of Children & Families Child Protective Investigator
Tania Schmidt-Alpers, Esquire

Investigating and Prosecuting DV and Dating Violence Cases

This session is designed to better prepare law enforcement officers, prosecutors, and other community agency representatives who work in the field of domestic violence with investigating and prosecuting domestic violence cases. We will explore evidence-gathering and legal issues in the context of how to build cases that can be successfully prosecuted in court.

Presented By:

Captain Jerome Miller, Apopka Police Department

R.J. Larizza, State Attorney for the Seventh Judicial Circuit

Michele Simonsen, Assistant State Attorney for the Seventh Judicial Circuit

Domestic violence is the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior perpetrated by an intimate partner against another. It is an epidemic affecting individuals in every community, regardless of age, economic status, race, religion, nationality or educational background. Violence against women is often accompanied by emotionally abusive and controlling behavior, and thus is part of a systematic pattern of dominance and control. Domestic violence results in physical injury, psychological trauma, and sometimes death. The consequences of domestic violence can cross generations and truly last a lifetime.

Summit Agenda

8:30 - 9:00 a.m.

Registration and Coffee

9:00 - 9:15 a.m.

Opening Remarks/Introductions

9:15 - 11:00 a.m.

“Walking in Her Shoes”

11:00— 11:15 a.m.

Break

11:15 a.m.—12:15 p.m.

“Children, Family & DV Issues”

12:15- 1:15 p.m.

Lunch (provided or on your own)

1:15 - 3:00 p.m.

“Investigating and Prosecuting Domestic Violence and Dating Violence Cases”



Darlene Wolfson was born and raised in Maine, but attended college and graduate school in Greensboro, North Carolina, and Gainesville, Florida. She began employment with the Domestic Abuse Council, Inc. in 2003 and is currently the Director of Outreach Programs after playing many roles within the agency.

Shawn Nelson graduated with a B.A. in Criminal Justice from Florida Atlantic University. She has spent 11 years with D.C.F. as a Child Protective Investigator. She is an avid photographer and mother of two and an advocate for children.

Tania Schmidt-Alpers is a sole practitioner in St. Augustine. Her principal areas of practice are child and family law with a strong focus on domestic violence issues. She is a recent recipient of the Florida Bar President's Pro Bono Service Award for her years of representation of domestic violence victims.

Captain Jerome Miller is a native of Altamonte Springs, Florida. He joined the Apopka Police Department in 1996 after graduating from college and graduate school in Texas and from the Seminole State College Basic Law Enforcement Academy. He has served in many capacities at the Apopka Police Department and was recently charged with the role of Captain of Administrative Services.

State Attorney R.J. Larizza was born in Jacksonville and moved to St. Augustine in 1983. After graduating from Troy University, he worked as a probation officer for 13 years. He has worked as both a prosecutor and in private practice and has served as State Attorney of the Seventh Judicial Circuit since 2009.

Michele Simonsen has worked as an Assistant State Attorney with the Seventh Judicial Circuit State Attorney's Office since 1998. She previously worked as a state prosecutor and an Assistant Federal Public Defender in South Carolina. She has handled exclusively domestic violence cases since 1999.

Presentations By:

*Domestic Abuse Council, Inc.
Department of Children & Families
Tania Schmidt-Alpers, Attorney
Apopka Police Department
7th Circuit State Attorney's Office*

Special Thanks to:

*Flagler County Sheriff's Office
St. John's County Sheriff's Office
Volusia County Sheriff's Office
Karin Flositz, C.P.C.
Michelle Smith, S.A.O.
Luis Bustamante, S.A.O.
Calvary Christian Center*