

Re: Please forward to Travis Mydock and include the documents I reference

Travis Mydock <Tmydock@mydocklaw.com>

Tue 1/23/2024 3:48 PM

To: Megan Prather <msullivan@lambertlaw.us>; mlambert@lambertlaw.us <mlambert@lambertlaw.us>

Received. Thank you for following up.

Sincerely,

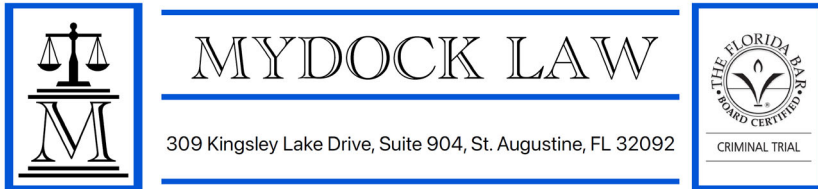
TRAVIS DREW EDEN MYDOCK, B.C.S

Board-Certified Specialist in Criminal Trial Law

Florida Bar No. 077548

tmydock@mydocklaw.com

(904) 864-3002



From: Megan Prather <msullivan@lambertlaw.us>

Sent: Tuesday, January 23, 2024 1:12 PM

To: Travis Mydock <Tmydock@mydocklaw.com>

Subject: FW: Please forward to Travis Mydock and include the documents I reference

Hey Travis,

Please see below from Mike.

Thank you,

Megan Prather

Legal Assistant to :

LAMBERT LAW

Michael H. Lambert, P.A.

428 North Halifax Avenue

Daytona Beach, Florida 32118

386-255-0464

FAX: 386-238-0908

From: Mike Lambert <mlambert@lambertlaw.us>

Sent: Tuesday, January 23, 2024 12:48 PM

To: Megan Prather <msullivan@lambertlaw.us>

Subject: Please forward to Travis Mydock and include the documents I reference

Travis: Jacob Kraker was the VCSO deputy arrested for Perjury In An Official Proceeding. He and Chitwood did not get along, so after his IA, the sheriff spoke with the State, a warrant was obtained, Kraker was arrested, perp-

walked, and media coverage slammed him. All documents referenced will be included. The Information @ Clerk Doc#2. We agreed to represent Kraker pro bono. Our Amended Motion for Statement of Particulars – Clk. Doc#23 was filed. A hearing had to be held because Thomas said we were not entitled. Judge Granted. Thomas' response Clk Doc#29. Based on its inadequacy, we filed another motion and for more specificity Clk Doc#31. We then scheduled depositions and the hearing on the "More Specific Request" was scheduled for 12/5/2021. In the interim, Thomas filed a Nolle Proesqui (Clk. Doc. # 40) wherein she included, " The arrest was sufficient ..." to address the wrong. Though it is incumbent upon the State to prove guilt, Kraker was terminated as a result and his reputation was tainted so he (we) were awaiting the opportunity to prove his innocence and clear his name.

The State controls the whole process, though it was doing Chitwood's bidding (perhaps why he wrote her a recommendation letter). What authority destroys one's reputation, gives him an arrest record, and when it became clear Kraker was not going to cower, " We did want we wanted, so now we will dismiss, precluding any effort by Kraker to defend himself and expose the abuse of authority". BTW, Kraker went to arbitration, got his job back, his record cleared, and all of his back pay and benefits, then rightfully resigned, not wanting a similar incident to occur.

The next case is Leone 2021 302879 CFDB, the John Reid [REDACTED] Atty. fees case. Thomas was assigned immediately. She contacted us with the PTI offer, with the only component being to pay [REDACTED] Atty fees for the civil case that spawned the criminal. On five occasions, including personal appearances with the State, we repeatedly stated, "You do not want to be prosecuting this case. You have a conflict of interest!". Additionally, we told her that if they did not get off the case, we would be compelled to file a motion to disqualify. Each effort to shed light on the conflict was met with, "There's nothing wrong". The 5th effort to try and sway her resulted in, "What's the big deal". Our motion to Disqualify prefaced the meetings, which began: " THE BIG DEAL". The Information was faulty, and the facts did not support the charges, so we filed a C4 MTD. The State's Traverse (Clk. Doc # 36) resulted in our Motion To Strike (Clk. Doc 390 and our Memorandum of Law. Not long after that, Thomas left on maternity leave. Though hearings were set on it and our MTD, Judge Case continued them. We filed a motion for Subpoena Deus Tecum from the NSBPD, [REDACTED] and the SAO. [REDACTED] hired Delgado to demand them. He and the State argued in concert that we were not entitled to [REDACTED] emails (The state had no standing to do so; however, it showed a continued connection. Judge Case granted in part and denied in part, but [REDACTED] was ordered to respond and provide communications. Too [REDACTED] gave a deposition that supported the alleged victims, whom [REDACTED] alleged owed fees to them which Leone must pay, the contention that "they agreed to represent me for free." [REDACTED] requested to read her depo before we received it. On the errata sheet, she wrote that her answer on a particular page was inaccurate, and she wanted to supplement it. That caused us to file a motion to retake her deposition and why. Judge Case granted it, then recused herself, with nothing more than, "I recuse myself and request the case be reassigned".

I recalled another case, and I will get you that information as well.

Finally, after we spoke, I recalled Judge Miller putting his name in. Chris is a nice person; however, I do not believe he has the capacity for circuit court. Again, a good, decent man.

All the Judges I grew up with will soon be resigning. The void that will be created is immeasurable. We currently have too many prosecutors who are now judges. It escapes me that they are seemingly perceived above civil and criminal defense lawyers. Many are more known because of the salacious media coverage of various cases they prosecute. I always told our commission that we are not here to send the best out of those who applied. We are to nominate the most qualified, and if we have good people but are not qualified for the seat, we just simply notify the Governor's office, requesting the application period be reopened.

My " too many prosecutors" excludes Andy Urbanik. Though a prosecutor, he is the pinnacle of that office-humble, principled, even-tempered, soft-spoken, learned, prepared and replete with common sense. Of all the prosecutors AND all other applicants that I know, he is truly the most qualified. This despite no civil background. He has the acuity to pick it up quickly without jeopardizing the initial proceedings litigants he would preside over. Mike

STATE OF FLORIDA

VS.

JACOB KRAKER

W/M; DOB: [REDACTED] SS [REDACTED]

IN THE COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA, IN THE YEAR TWO THOUSAND TWENTY ONE

CASE NO:

AGENCY: VCSO/210005033

CAPIAS REQUESTED

INFORMATION

CHARGE(S):

1) PERJURY IN OFFICIAL PROCEEDING

R.J. LARIZZA, State Attorney for the Seventh Judicial Circuit of the State of Florida and as such prosecuting attorney for this Court, in the name of and by the authority of the State of Florida charges that:

COUNT I: JACOB KRAKER, on diverse dates, on or between, July 25, 2020 and September 15, 2021, in the County of VOLUSIA and State of Florida, did unlawfully make a false statement, which JACOB KRAKER did not believe to be true, under oath in an official proceeding in regard to any material matter, contrary to Florida Statute 837.02(1). (3 DEG FEL).

FOR THE STATE ATTORNEY

SARAH THOMAS
Bar No. 119419
ASSISTANT STATE ATTORNEY
SEVENTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA
251 NORTH RIDGEWOOD AVENUE
DAYTONA BEACH, FL 32114
(386) 239-7710
ESERVICEVOLUSIA@SAO7.ORG

COUNTY OF VOLUSIA

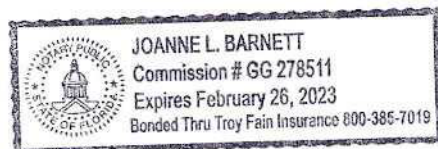
STATE OF FLORIDA

Personally appeared before me SARAH THOMAS, 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 information 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. Said facts based on testimony of material witnesses.

SWORN to and subscribed before me this 16th day of March, 2021.

Submitted to the Clerk of the Court, Seventh Judicial Circuit, in and For VOLUSIA County, Florida, on the 16th day of March, 2021.

NOTARY PUBLIC AT LARGE
STATE OF FLORIDA



7th. Judicial Circuit 707
Charging Affidavit - Volusia

Report No. 210005033

Nature of Call: INFO
Confidential:

Report Date: 03-16-2021 Report Time: 1330 District: 02
Arrest # _____ Bk # _____ Pg # 1 of 4

ARREST <input type="checkbox"/>	NOTICE TO APPEAR <input type="checkbox"/>	AFFIDAVIT <input checked="" type="checkbox"/>	C.C. <input type="checkbox"/>	ADULT <input type="checkbox"/>	JUVENILE <input type="checkbox"/>	Court Case Number:	
(ORI) FL:	FL0840000	Agency Name	VOLUSIA COUNTY SHERIFF'S OFFICE			Agency Case Number:	210005033
FCIC/NCIC Check? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	OBTS #	U.C.R.:	Date Arrested:	Time of Arrest:			
ADDRESS OF ARREST (Street, City, State, Zip):			Arrested By:	SHIVERS, DANIEL		ID Number:	6842
DEFENDANT		NAME (Last)	(First)	(Middle)	A.K.A.:	Sex:	Race:
		1 Kraker	Jacob	Young		M	W
DOB:	Age:	Driver's Lic./ID No.:	State:	Year Expires:	S.S.# -		
		36	FL				
Height:	Weight:	Hair:	Eyes:	P.O.B. (City, State, Country):	Statement: Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		
6' 00	215	BLD	BLU		Citizenship: Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		
Scars, Marks, Tattoos:	Business & Occupation:		English: Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		Deaf/Mute: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		
Probation: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Sexual Predator: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>						
Address - Mailing/Permanent		(STREET, APT. NUMBER)	(CITY)	(STATE)	ZIP CODE	RESIDENCE PHONE	
Address - Local		(STREET, APT. NUMBER)	(CITY)	(STATE)	ZIP CODE	RESIDENCE PHONE	
Address - Other (Employer/School)		(STREET, APT. NUMBER)	(CITY)	(STATE)	ZIP CODE	BUS/SCHOOL PHONE	

CHARGES	DOMESTIC VIOLENCE? Yes <input type="checkbox"/>	Attachments: Affidavit(s)? <input checked="" type="checkbox"/>	Statement(s) <input type="checkbox"/>	NTA Schedule <input type="checkbox"/>	Report <input checked="" type="checkbox"/>	Traffic Infraction(s) <input type="checkbox"/>	DUI <input type="checkbox"/>	Total Charges: 1
#1 Charge:	Perjury-False Stmt. in Official Proceeding		FEL <input checked="" type="checkbox"/> MISD <input type="checkbox"/> ORD <input type="checkbox"/>	FS/ORD: 837.02	Citation No.:	Bond:		
#2 Charge:			FEL <input type="checkbox"/> MISD <input type="checkbox"/> ORD <input type="checkbox"/>	FS/ORD:	Citation No.:	Bond:		
#3 Charge:			FEL <input type="checkbox"/> MISD <input type="checkbox"/> ORD <input type="checkbox"/>	FS/ORD:	Citation No.:	Bond:		

CO-DEFENDANT	Co-Def #1. Arrested? Y <input type="checkbox"/> N <input type="checkbox"/>	Fel. <input type="checkbox"/> Misd. <input type="checkbox"/> Traf. <input type="checkbox"/> Ord. <input type="checkbox"/> NTA <input type="checkbox"/>	Co-Def #2. Arrested? Y <input type="checkbox"/> N <input type="checkbox"/>	Fel. <input type="checkbox"/> Misd. <input type="checkbox"/> Traf. <input type="checkbox"/> Ord. <input type="checkbox"/> NTA <input type="checkbox"/>		
#1 NAME (Last)	(First)	(Middle)	Race:	Sex:	DOB:	Age:
#2 NAME (Last)	(First)	(Middle)	Race:	Sex:	DOB:	Age:

NARRATIVE The undersigned certifies and swears that there is probable cause to believe the above-named defendant, on the 24 day of August, 2020, at approximately 0222 a.m. p.m. at 123 W. Indiana Avenue DELAND within Volusia County, violated the law and did then and there:

1 Jacob Kraker knowingly and intentionally made a false statement in a sworn official proceeding, to wit:
 2
 3 On August 24, 2020, Lieutenant Shivers and Sergeant Brian Cobb, both sworn deputies with the Volusia Sheriff's Office, conducted a sworn interview
 4 with Jacob Kraker during an administrative investigation into Volusia Sheriff's Office Standards and Directives and Volusia County Merit System
 5 Rules and Regulations violations (Kraker was a sergeant with the Volusia Sheriff's Office at the time of the interview). Kraker was the subject of the
 6 internal investigation, and sworn in by Lieutenant Shivers; a sworn and certified law enforcement officer in the State of Florida. Lieutenant Shivers
 7 asked Kraker to raise his right hand to be sworn, at which Kraker freely and voluntarily raised his right hand. While Kraker had his hand raised,
 8 Lieutenant Shivers asked Kraker, "Do you solemnly swear or affirm the statement your about to give is the truth, the whole truth and nothing but the
 9 truth?" at which time Kraker replied, "Yes sir." Lieutenant Shivers then stated, "Any false statements about material matters given by a witness under
 10 oath will constitute perjury, which is a third degree felony according to section 837.02 Florida Statutes. Do you understand that if you knowingly make
 11 material misstatements of facts to me during this investigation you will have committed the crime of perjury?" at which time Kraker stated, "Yes."
 12 Lieutenant proceeded with the administrative questioning of Kraker.
 13
 14 Lieutenant Shivers confirmed Kraker received copies of the entire investigative case file, along with two flash drives which contained body worn
 15 camera footage and surveillance video of the incident. It should be noted, prior to the interview, Kraker was provided as much time as he required to

NOTICE TO APPEAR	MANDATORY APPEARANCE <input type="checkbox"/>	YOU NEED NOT APPEAR IN COURT BUT MUST COMPLY WITH INSTRUCTIONS ON THE REVERSE SIDE OF YOUR COPY <input type="checkbox"/>	FINE, AND COSTS AMOUNT:
I AGREE TO APPEAR IN COURT HEREIN TO ANSWER THE OFFENSE CHARGED OR TO PAY THE FINE INDICATED, I UNDERSTAND THAT SHOULD I WILLFULLY FAIL TO APPEAR BEFORE THE COURT AS REQUIRED, OR PAY THE LISTED FINE, I MAY BE HELD IN CONTEMPT OF COURT AND A WARRANT FOR MY ARREST WILL BE ISSUED.			
SIGNATURE OF DEFENDANT	Date	RELATIONSHIP TO JUVENILE	JUVE DISP. CITATION No.
Sworn to and subscribed before me, the undersigned this <u>16</u> day of <u>March</u> , <u>2021</u> Name: <u>[Signature]</u> <u>7550</u>		I swear/affirm the above statements are correct and true <u>[Signature]</u> OFFICER'S/COMPLAINANT'S SIGNATURE	
Notary Public <input type="checkbox"/> Law Enforcement or Corrections Officer <input checked="" type="checkbox"/>	SHIVERS, DANIEL	6842	
Personally Known <input checked="" type="checkbox"/> Produced Identification <input type="checkbox"/>	NAME (PRINTED)	ID NUMBER	
Type of Identification:	Inmate Number & Facility:		

OFFICIAL USE ONLY

Narrative Supplement 707-B

Arrest
 Affidavit
 Notice to Appear
 Adult
 Juvenile

Court Case Number:

Page # 3 of 4

Defendant (Last) Name: Kraker	(First) Jacob	(Middle) Young	Agency Case Number: 210005033
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CHARGES		DOMESTIC VIOLENCE? Yes <input type="checkbox"/>	Attachments: Affidavit(s)? <input checked="" type="checkbox"/>	Statement(s) <input type="checkbox"/>	NTA Schedule <input type="checkbox"/>	Report <input checked="" type="checkbox"/>	Traffic Infraction(s) <input type="checkbox"/>	Total Charges: 1
#	Charge:	FEL <input type="checkbox"/>	MISD <input type="checkbox"/>	ORD <input type="checkbox"/>	FS/ORD:	Citation No.:	Bond:	
#	Charge:	FEL <input type="checkbox"/>	MISD <input type="checkbox"/>	ORD <input type="checkbox"/>	FS/ORD:	Citation No.:	Bond:	
#	Charge:	FEL <input type="checkbox"/>	MISD <input type="checkbox"/>	ORD <input type="checkbox"/>	FS/ORD:	Citation No.:	Bond:	

16 view the case file and video evidence; as per the Florida Officer's Bill of Rights. Kraker advised during the interview that he did not have any
 17 questions regarding the case file or video evidence.
 18
 19 During the interview, Kraker advised on July 25, 2020, he was off-duty, working as a courtesy officer for [REDACTED] apartments, when he
 20 received a complaint of people being in the pool area of the complex after closing hours. Kraker advised he responded, in plain-clothes, to investigate
 21 the complaint.
 22
 23 While conducting the investigation, Kraker identified himself as a law enforcement officer, specifically as a Sergeant with the Volusia Sheriff's Office
 24 by showing his badge and credentials and verbally telling the persons that he was a deputy. Kraker ultimately used force against one of the males; to
 25 include a neck/choke hold contrary to Volusia Sheriff's Office Standards and Directives.
 26
 27 While explaining to Lieutenant Shivers his version of the incident, Kraker advised, "At that point he [Dane Wehr] kind of like I think breaks away from
 28 his friend and he starts coming at me pretty aggressively and then throws his face into my face making contact with me..."
 29
 30 Lieutenant Shivers observed the video surveillance does not depict Dane Wehr "head butting" Kraker in the head/face area prior to Kraker applying
 31 force as stated during this interview and documented in the original incident report Kraker authored following the incident (Volusia Sheriff's Office
 32 report number 200013365). The statement made by Kraker that Dane Wehr "head butted" him was untruthful.
 33
 34 It should be noted, Kraker exclaimed numerous times to Port Orange Police Officers that he was uninjured during the altercation, and made no
 35 statements regarding head or face injuries. Also, no obvious signs of injury to Kraker's face or head were present on any of the Port Orange Police
 36 body worn camera recordings, nor were they observed when he was served with his notice of internal investigation on August 5, 2020.
 37
 38 Also during the interview, Kraker was asked, "did you place him into any type of neck hold or any variation of a neck or chokehold?" at which time
 39 Kraker replied with, "No."
 40
 41 Lieutenant Shivers observed Kraker's statement that he did not place Dane Wehr into any type of neck or chokehold was untruthful. Dane Wehr
 42 provided statements to law enforcement officers for Port Orange Police and Volusia Sheriff's Office indicating Kraker placed him into a neck/choke
 43 hold. Witnesses who observed the altercation between Kraker and Dane Wehr (Nicholas Bevacqua & Barkin Kesimer) also corroborated this.
 44
 45 Based on the statements made by Kraker during his sworn interview, the totality of the circumstances, and video evidence, Lieutenant Shivers
 46 determined Kraker was untruthful during his sworn interview with investigators. Lieutenant Shivers completed a charging affidavit against Kraker for
 47 Perjury in an Official Proceeding and forwarded it to the State Attorney's Office for review.

Sworn to and subscribed before me by the undersigned this <u>10</u> day of <u>MAR</u> , <u>2021</u> Name: <u>[Signature]</u> <u>7550</u>	I swear/affirm the above statements are correct and true <u>[Signature]</u> OFFICER'S/COMPLAINANT'S SIGNATURE	Right Thumb
Notary Public <input type="checkbox"/> Law Enforcement Officer <input checked="" type="checkbox"/> Personally Known <input checked="" type="checkbox"/> Produced Identification <input type="checkbox"/> Type of Identification:	NAME (PRINTED) _____ ID NUMBER _____	

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

STATE OF FLORIDA,

CASE NO.: 2021 100481 CFDL

vs.

JACOB KRAKER,

Defendant.

_____ /

AMENDED MOTION FOR STATEMENT OF PARTICULARS

The Defendant, JACOB KRAKER, by and through his undersigned counsel, hereby amends his previously filed Motion For Statement Of Particulars, seeking the following:

1. The Defendant is aware that he is alleged to be the perpetrator of the crime of Perjury based upon a compelled interrogation on August 24, 2020, within Volusia County, Florida.

2. What the Defendant, JACOB KRAKER, and his counsel, are unaware of is what in the 15 pages, single-spaced, transcript of that interrogation he is alleged to have said that was false, which he did not believe to be true while under oath in an official proceeding in regard to any material matter?

3. Not knowing what statement is alleged to be perjury, the Defendant and his counsel are disadvantaged.

4. Is it the State's position that the Defendant, JACOB KRAKER, was on duty as a Volusia County Deputy Sheriff when he went to the pool area of [REDACTED] apartments, or anytime thereafter up to and including when Dane Wehr left the area?

5. Does the State have an expert it intends to use in its case in chief, if so who?

WHEREFORE the Defendant, JACOB KRAKER, respectfully request this Honorable Court to require the State to provide the specific statement it alleges supports the charge of Perjury pending herein.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by electronic delivery to Assistant State Attorney Sarah Thomas on this 21st day of July, A.D., 2021.

LAMBERT LAW

/s/ Michael H. Lambert

MICHAEL H. LAMBERT, ESQUIRE

Florida Bar No. 0188156

BRYAN G. LAMBERT, ESQUIRE

Florida Bar No. 0097988

428 North Halifax Avenue

Daytona Beach, Florida 32118

(386) 255-0464

MSullivan@LambertLaw.us

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

CLERK OF THE CIRCUIT
COURT VOLUSIA CTY., FL
CC 45

2021 SEP 24 PM 3:57

FILED

STATE OF FLORIDA

VS.

CASE NO: 2021 100481 CFDL

JACOB YOUNG KRAKER /

STATEMENT OF PARTICULARS

COMES NOW the undersigned Assistant State Attorney, in response to Defendant's Amended Motion for Statement of Particulars dated 7/26/2021 and pursuant to the Court Order for written response in open court on 9/2/2021, states the following:

1. The alleged conduct is an on-going criminal act/acts which occurred from July 25, 2020, through September 15, 2021.
2. The State alleges that the defendant committed the offense: Perjury in Official Proceeding, in violation of Florida Statue 837.09(1).
3. The Defendant was previously employed by the Volusia County Sheriff's Office as a police officer.
4. On July 25, 2020, The Defendant was off-duty acting as a "courtesy" officer at an apartment complex in Daytona Beach, Florida.
5. An incident occurred involving occupants of the apartment complex wherein this Defendant engaged in a physical altercation where physical force was used.
6. This Defendant identified himself as a law enforcement officer to the individuals present.
7. An internal investigation was ordered due to the nature of the incident and the involvement of this Defendant, with the Volusia County Sheriff Office. On August 5,

2020, Chief Deputy Joseph Gallagher assigned the above incident to the Department of Internal Affairs (*herein referred to as IA*).

8. During the course of the investigation the Defendant was given notice of the proceedings and participated in recorded interviews, meetings, and/or the compilation of official documents while under oath and with affirmation that he was obligated by conscious or by law to speak the truth. The oath or affirmation was made by the Defendant, and to an individual within the official capacity of the Volusia County Sheriff's Office Administration and/or Department of Internal Affairs.
9. The State intends to prove that during the course of the investigation the Defendant provided false information, statements both written and/or oral, which later proved to be false.
10. The Defendant told IA that Dane Wehr headed butted him prior to him using physical force. The Defendant stated he never placed Dane Wehr in a neck or "chokehold" or any variation thereof. The Defendant also told IA he contacted Dane Wehr the following day on July 26th, 2020.
11. The State intends to prove the Defendant's recitation of events regarding the incident dated July 25, 2020 and the following Internal Investigation, in whole or in part, are inconsistent with video evidence and investigative documents compiled by or in the possession of the Volusia County Sheriff's Office, and the Office of the State Attorney.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by hand/fax/mail to: MICHAEL LAMBERT, 428 North Halifax Avenue, DAYTONA BEACH, FL 32118 this _____ day of _____, 2021.

A handwritten signature in black ink, appearing to read "Sarah Thomas". The signature is written in a cursive style with a horizontal line underneath the name.

SARAH THOMAS
ASSISTANT STATE ATTORNEY
251 N. RIDGEWOOD AVENUE
DAYTONA BEACH, FL 32114
(386) 239-7710
FL BAR # 119419

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

STATE OF FLORIDA,

CASE NO.: 2021 100481 CFDL

vs.

JACOB KRAKER,
Defendant.

**MOTION FOR SPECIFIC AND COMPLETE RESPONSES TO
COMPELLED STATEMENT OF PARTICULARS**

The Defendant, Jacob Kraker, is charged in a single count Information with Perjury In An Official Proceeding and as follows:

“COUNT I: JACOB KRAKER, on diverse dates, on or between, July 25, 2020 and September 15, 2021, in the County of VOLUSIA and State of Florida, did unlawfully make a false statement, which JACOB KRAKER did not believe to be true, under oath in an official proceeding in regard to any material matter, contrary to Florida Statute 837.02(1). (DEG FEL)”

1. This Court ordered the State to respond to the Defendant’s requested Statement of Particulars on September 2, 2021.
2. On September 24, 2021, the State of Florida filed its Statement of Particulars.
3. Believing that his prosecution was based solely upon his Internal Affairs investigation of August 24, 2020, Kraker in his request for particulars asserted the same as his belief of the date and place of the interrogation.
 - A) However, in its response, the State has alleged that the offense with which Kraker is being prosecuted is an “on-going criminal act/acts which occurred from July 25, 2020 through September 15, 2021”. (paragraph 1 of State’s Statement of Particulars)

I. Defendant's Response

- i) As “on-going”, Kraker’s counsel assumes the Statement of Particulars contends that Kraker’s prosecution is for a continuing, “on-going” offense of Perjury In An Official Proceeding alleged to have lasted some 53 days.
 - ii) Believing that Kraker’s alleged offense and prosecution was solely based upon his August 24, 2020 Internal Affairs investigation, Kraker initially sought the specific statements made by him in that 15 page transcript that the State alleged to be perjury. The State has summarized three contexts “statements” from that IA event in its Particular’s response; however, Kraker is entitled to know the verbatim statement for which he is being prosecuted. (State’s Particulars, pp 10)
- B) Following its “on-going” continuous offense response, the State alleges Kraker’s perjury occurred:
- i) “During the course of the investigation the Defendant”:
 - (a) “participated in recorded interviews”;
 - (b) participated in “meetings”; and/or,
 - (c) participated in “the compilation of official documents”.
 - ii) Further, that “during the course of the investigation the Defendant provided false information/statements both written and/or oral...”

II. Defendant's Response

- A) Though now baffled as to the prosecution, Kraker seeks the specific:
- i) Date, place, and names of parties at the “recorded interviews” AND the exact verbatim statement or statements in each which is/are alleged to be perjury;
 - ii) Date, place, and name of attendees at the “recorded meetings” AND the exact statement or statements in each which is/are alleged to be perjury;
 - iii) The “compilation of official documents” and where in each, the State alleges a statement or statements by Kraker is/are perjury, to include the exact statements.

Again, and errantly, Kraker and his counsel believed his prosecution to be based solely upon,

and somewhere within, the 15 page transcript of his August 24, 2020 Internal Affairs sworn testimony; therefore, and in his original Request for Particulars, was seeking the specific statements therein alleged to be perjury.

Now Kraker has been informed that his charged Perjury In An Official Proceeding or multiple official proceedings spans 53 days and includes “recorded interviews”, “recorded meetings”, and/or “the compilation of official documents”. These pronouncements by the State; however, are without any date, place, or specific statements alleged within each attributable to Kraker, as under oath perjury.

The State’s Particulars are generic, alleging that it was within “meetings”, “interviews”, and/or “in the compilation of official documents” Kraker provided under oath false statements. These generic responses subject Kraker not only to trial by ambush, but also to “gottcha” tactics repudiated by trial and appellate courts. (See *Scipio v. State*, 928 So.2d 1138 (Fla. 2006)) Too, the lack of specificity subjects Kraker to double jeopardy.

Due process mandates an accused be apprised of the nature of the offense with which he is charged and how he is alleged to have committed it prior to either arriving at the courthouse for his trial or during the course of the trial itself.

Assuredly the State knows the exact verbatim statements it intends to present to this Court or a jury in an effort to convict Kraker of Perjury In An Official Proceeding. Failure to disclose them to Kraker is a blatant denial of due process.

Consider the State prosecuting one for:

- (a) Battery but not listing a specific person alleged to be battered, including instead “To Be Announced” (TBA). In discovery the report names numerous people as having physical contact with the defendant;

- (b) Charging a defendant with Sale of A Controlled Substance without naming any specific substance or person sold to. In discovery, the reports include that he sold cocaine, heroin, hydrocodone, and cannabis, each to a different person. Which of these should he prepare to defend, understanding all but the cannabis sale would be a second degree felony?
4. Additionally, in its compelled Particulars response, the State includes:
- i) “The Defendant told IA that Dane Wehr head butted him prior to him using physical force.” (State’s Response, paragraph 10);
 - ii) “The Defendant stated he never placed Dane Wehr in a neck or “chokehold” or any variation thereof.” (State’s Response, paragraph 10);
 - iii) “... the Defendant’s recitation of events regarding the incident dated July 25, 2020 and the following Internal Investigation, **in whole or in part**, are inconsistent with video evidence and the investigative documents compiled by or in the possession of Volusia County Sheriff’s Office, and the Office of the State Attorney”. (State’s Response, paragraph 11). (emphases added)

III. Defendant’s Response

A) None of the above paragraph – 4 (i),(ii), or (iii) contain the exact verbatim specific statement made by Kraker. Each rather is the State’s summary of the content of the alleged false statement. Subsection 4 (iii) above states all statements by Kraker regarding the July 25, 2020 incident and either all or part of some investigation, and investigative files with the State Attorney and the Sheriff are inconsistent with a video. Though coy, such a response denies, rather than facilitates due process.

B) Perjury In An Official Proceeding requires the allegation and proof of specific verbatim statements made by the accused which were knowingly false.

All the Defendant Kraker has sought from the State is:

- i) What are those specific verbatim statements he is alleged to have made under oath that form the crux of his prosecution;
- ii) When were these specific statements made; and

iii) To whom were these statements made.

Apologetically redundant, Counsel and Kraker believed his prosecution was based upon some alleged false statement made during his Internal Affairs Investigation on August 24, 2020, and as a result, was seeking those specific statements when he filed his Amended Statement Of Particulars request.

5. Lastly, in the final sentence of its paragraph 10 Response, the following statement is made by the State:

“The Defendant also told IA **he** contacted Dane Wehr the following day on July 26, 2020”. (emphasis added)

IV. Defendant’s Response

C) Though undersigned counsel is not sure if that is an alleged false statement attributed to Kraker for which he is being prosecuted; however, it is knowingly and patently false.

As a quick synopsis of the July 25, 2020 incident:

In a June 2020 rental agreement with his apartment complex, Kraker agreed to become a “courtesy officer”. Those responsibilities included, but are not limited to, quelling disturbances. All responsibilities were while Kraker was at home in the apartment complex, off duty from the Sheriff’s Office, and always in plain street clothes.

In the late evening hours of July 25, 2020, a drunken 6’4, 240 pound, Dane Wehr was boisterously celebrating his 21st birthday with approximately three friends inside the apartment complex’s closed for the evening, gated pool. At home and in his apartment with his children, Kraker was called and asked to request those in the pool area to leave. Dressed in basketball shorts and a t-shirt, Kraker went to the pool area and found Wehr swimming in the pool and three of his friends also inside the closed, gated pool area. Wehr, nor at least two, and perhaps all three of

his friends were not residents of the complex. Wehr had once been, but not currently.

Kraker asked Wehr to get out of the pool and for his friends to leave. Wehr refused despite Kraker's request, and the pleas of his friends.

Kraker showed Wehr his Sheriff's Office badge, telling him he was a law enforcement officer. Wehr slapped the badge out of Kraker's hand. Unsuccessful in his efforts to get Wehr to leave, Kraker notified him that he was, and did, call the Port Orange Police Department to come and get Wehr out. Wehr charged Kraker, they tussled, and Wehr gave up. Wehr and his friends left before Port Orange police officers arrived. Eventually, Wehr and his friends were located and they gave statements to the Port Orange Police.

Kraker signed a statement that he did NOT want Wehr to be prosecuted. Wehr was not arrested, nor was any prosecution ever sought or contemplated.

The following day, July 26, 2020, Wehr was again at the apartment complex, as was Kraker. Wehr, wanting to apologize for being a drunken "douchebag", as well as the eventual altercation, saw Kraker walking down the stairs from his apartment and asked to speak with him. Kraker, among other things, accepted Wehr's apology.

As Kraker had prior IAs which he may have succeeded at, his relationship with Sheriff Chitwood was strained, adversarial, and combative.

Though Wehr never complained to law enforcement that Kraker had done anything wrong, nor injured in any way, accepted full responsibility for his abusive behavior, and remorsefully apologized for it, including attacking Kraker (all supported by Wehr's friends), the Sheriff's Office began an investigation against Kraker.

D) In the Internal Affairs investigation, and as it relates solely to the State's representation in the final sentence of its paragraph 10, Wehr stated the following in his sworn statement of August 19, 2020:

- a) "I initiated the conversation" (page 7, lines 309-312; page 13, lines 560-562);
- b) "I saw Kraker at the apartment complex just walking." (page 7, lines 314-316);
- c) "When I saw Kraker walking I said to him, "Hey, what's up?" (page 7, lines 314-316; page 8, line 327). (Composite Exhibit A)

From Kraker's sworn IA statement, when questioned about seeing Wehr on July 26, 2020, the following exchange occurred between IA Investigator Lieutenant Don Shivers (herein after referred to as "DS"), and Kraker (herein after referred to as "JK"):

DS: Have you had any contact with the **suspect** since the incident occurred?" (referring to Wehr)

JK: Yes.

DS: When?

JK: The following day.
(Kraker's IA statement of August 20, 2020, page 8, lines 350-356)
(Composite Exhibit B)

* * * *

Thereafter, one of Kraker's representatives at the Internal Affairs investigation, Gary Wilson (herein after referred to as "GW"), was asked by the investigators if he had any follow up questions for Kraker. The following exchange occurred:

"GW: Sergeant Kraker, when you spoke with Mr. Wehr the following day

JK: Uh huh.

GW: Did you approach him or did he approach you?

JK: He approached me.

GW: So you didn't go seeking him out?

JK: No... I was walking out of my apartment building and he was

walking up... He asked me if he could speak with me..."
(Kraker IA statement of August 24, 2020, at pg. 10, lines 412-423)
(Composite Exhibit B)

Contrary to the State's assertion that Kraker told Internal Affairs that he "contacted Dane Wehr" the following day on July 26, 2020, nowhere in Kraker's IA sworn testimony is there any statement that the day after the incident "Kraker contacted Dane Wehr..."

In fact, it is unequivocally the complete opposite, i.e., according to Kraker, Wehr approached/contacted him, profusely apologizing for his misbehavior the night before.

In Wehr's sworn IA statement of August 19, 2020, the day before Kraker's statement, Wehr corroborated Kraker's later statement, stating he approached, sought out, and contacted Kraker as he was walking, desirous of, and apologizing to, Kraker for his behavior the night before. When Wehr was asked what the context of the conversation was about, he responded, "Me saying sorry about probably 8, 10 times." (Wehr's statement, page 8, lines 334-336) (Composite Exhibit A)

Despite these unassailable, consistent statements of both Wehr and Kraker that Wehr sought out, approached, and contacted Kraker the following day, the State has alleged the opposite.

The purpose or reason for the misrepresentation by the State is unknown to counsel; however, it is a glaring, patently untrue, unsupportable representation.

6. Though compelled to respond to the Defendant's Particulars request, the State specifically ignored paragraph 5 of Kraker's motion – "Does the State have an expert it intends to list and/or use in the prosecution of Kraker?"

WHEREFORE, the Defendant, Jacob Kraker, respectfully requests this Honorable Court to compel the State to list the specific verbatim quotes attributable to Kraker which are alleged to be knowingly false. If that statement or statements occurred during an "interview" of Kraker, when that

interview occurred, and who was present. If during a “meeting”, when and where the meeting occurred, and who was present. If statements by Kraker, contained within files at the State Attorney’s Office or the Sheriff’s Office, within the compilation of official documents, are alleged to be false, what those documents are and what specific verbatim statement it is.

Additionally, if Kraker is being prosecuted for any alleged perjury to have occurred during his Internal Affairs investigation, what that specific quoted, knowingly false statement was.

If it is alleged that during some other investigation Kraker provided a knowingly false statement, what that specific verbatim statement was, when that investigation occurred, and who conducted it.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by electronic delivery to Assistant State Attorney Sarah Thomas on this 6th day of October, A.D., 2021.

LAMBERT LAW

/s/ Michael H. Lambert

MICHAEL H. LAMBERT, ESQUIRE

Florida Bar No. 0188156

BRYAN G. LAMBERT, ESQUIRE

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

STATE OF FLORIDA,

CASE NO.: 2021 100481 CFDL

vs.

JACOB KRAKER,
Defendant.

MOTION FOR SPECIFIC AND COMPLETE RESPONSES TO
COMPELLED STATEMENT OF PARTICULARS

**COMPOSITE
EXHIBIT
A**

**DANE WEHR'S STATEMENT
PAGE 1, 7, 8 AND 20**

Witness Statement

DS – Lt. Daniel Shivers DW – Dane Wehr
BC – Det. Brian Cobb

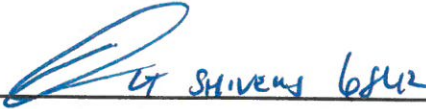
- 1 DS Alright this will be a taped interview in reference to IA case number 20-013. Today's
2 date is August 19, 2020 the time is 1334 hours. The location of the interview is 513
3 Coral Trace in Edgewater. Presently being interviewed is Dane Wehr. Also present is
4 Sgt. Cobb with the Volusia County Sheriff's Office Internal Affairs unit. I'm Lt. Dan
5 Shivers with the Volusia County Sheriff's Office Internal Affairs unit. Dane are you
6 aware this interview is being recorded?
7
- 8 DW Yes.
9
- 10 DS Alright as a Florida Law Enforcement Officer and a Notary Public of the State of Florida
11 I am empowered take sworn statements. At this time, I'd ask that you raise your right
12 hand to be sworn please. Do you solemnly swear or affirm that the statement that you're
13 about to give is the truth, the whole truth and nothing but the truth so help you God?
14
- 15 DW Yes.
16
- 17 DS Ok can you please state your name for me.
18
- 19 DW Dane Wehr.
20
- 21 DS Can you spell it for me.
22
- 23 DW D-A-N-E, W-E-H-R.
24
- 25 DS Ok the reason that we're talking to you is because of an incident that occurred on July 25,
26 2020. Do you recall the incident?
27
- 28 DW Somewhat.
29
- 30 DS Ok would you just in your own words tell me what happened?
31
- 32 DW A altercation broke out between me and a police officer of the Volusia County
33 (unintelligible) and that's about it. And some things got physical then it got averted.
34
- 35 DS Ok can you just explain to me in just a little more detail as to what happened, what
36 occurred and how you guys ended up where we are today?
37
- 38 DW Some things were said and...
39
- 40 DS Well like what things?

271 DW Nick.
272
273 DS Do you know his last name?
274
275 DW I don't know how to spell it. Bovakawa?
276
277 DS Best guess.
278
279 DW B-O-V-A-Q-U-E, something weird like that.
280
281 DS B-O-V-A-Q-U-A or something like that?
282
283 DW Yeah something like that.
284
285 DS What's his phone number?
286
287 DW His phone number is 561
288
289 DS Uh huh.
290
291 DW 847
292
293 DS Uh huh.
294
295 DW 6742
296
297 DS Alright have you talked to him since?
298
299 DW No.
300
301 DS No just Barkin?
302
303 DW Yep.
304
305 DS Are you and Barkin like good friends or?
306
307 DW Decent friends yeah.
308
309 DS So alright lets get back to the discussion you had with Sgt. Kraker like who initiated that
310 conversation?
311
312 DW Me.
313
314 DS So you called him like you had his number?
315
316 DW I saw him yeah just walking down.

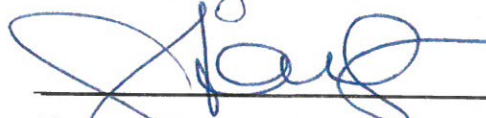
317 DS Saw him where?
318
319 DW In the apartment that he lives in [REDACTED]
320
321 DS Oh so you were back there?
322
323 DW Uh huh.
324
325 DS Ok and you just, what did you say to him?
326
327 DW I said hey what's up?
328
329 DS Did he remember you?
330
331 DW Yeah he remembered me of course he remembered me it was fresh it was like two days,
332 three days, four days maybe after?
333
334 DS And then but like I mean what context was the, the conversation?
335
336 DW Friendly. Me saying sorry about probably eight, ten times.
337
338 DS Right.
339
340 DW And then we talked about the grill and then we talked about what he was gonna do that
341 night and then we talked about what happened that night and then we laughed a bit and
342 then we shook hands and he went on his way and I went on my way.
343
344 DS So when you guys talked about the incident that happened like what was, what all was
345 said like...
346
347 DW He was just giving me details about what happened, and his point of view.
348
349 DS Ok. But that's not what you specifically remembered the night it happened right?
350
351 DW Yeah.
352
353 DS The details that he had was a little bit different than the details that you (inaudible) Port
354 Orange.
355
356 DW Yeah then I got them confirmed, I got them confirmed by someone. Because whoever
357 came the bald guy I don't know I don't remember his name I think he was from Port
358 Orange maybe? Or maybe he was from Volusia. I don't know he came...
359
360 DS He came to your house here?
361
362 DW Yeah.

I, Lt. Daniel Shivers swear that the forgoing is an accurate transcription of the sworn recorded statement of Dane Wehr taken by me on August 19, 2020.

(Signed)



Sworn to and subscribed before me this 21st Day of August, 2020.



Signature of Notary Public-State of Florida



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

My Commission Expires:

My Commission Number is:

Personally Known

Produced identification

Type of Identification Produced

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

STATE OF FLORIDA,

CASE NO.: 2021 100481 CFDL

vs.

JACOB KRAKER,
Defendant.

MOTION FOR SPECIFIC AND COMPLETE RESPONSES TO
COMPELLED STATEMENT OF PARTICULARS

**COMPOSITE
EXHIBIT
B**

**JACOB KRAKER'S STATEMENT
PAGES 1, 8, 10 AND 16**

Witness Statement

DS – Lt. Dan Shivers BC – Det. Brian Cobb
JK – Sgt. Jacob Kraker GW – Gary Wilson BH – Sgt. Brodie Hughes

1 DS Alright so I'm gonna start with the administration of oath and perjury warning. This is IA
2 case number 20-013 the subject is Jacob Kraker. I am Lt. Daniel Shivers along with Sgt.
3 Brian Cobb and we are both with the Volusia Sheriff's Office Internal Affairs unit. Also
4 present for this interview representing Sgt. Kraker is Gary Wilson and also Brodie
5 Hughes is here. Today's date is August 24, 2020 and the current time is 1422 hours. The
6 location of this interview is the Sheriff's administrative offices in Deland, Florida. Sgt.
7 Kraker are you aware this interview is being recorded?
8

9 JK Yes sir.

10
11 DS I am conducting an official administrative investigation concerning policy 26.2.105
12 Unlawful use of deadly force. It says deputies shall use deadly force in strict accordance
13 with the policy and procedures established in directive 1.1 use of force guidelines and
14 shall not violate or exceed statutory provisions governing the use of deadly force to the
15 extent that injury or death is inflicted or is likely to result violation or violation subject up
16 to dismissal. Policy 26.2.133 Job knowledge and performance which states repeated
17 failure to maintain necessary skills, knowledge and abilities after counseling and
18 instruction shall result in increasing the severity of disciplinary actions, violation subject
19 to dismissal. 26.2.134 Knowledge of official directives. VSO personnel are required to
20 possess a sound working knowledge of the policies and procedures established by the
21 standards directives. Volusia County Merit System Rules and Regulations 86-453, this
22 violation may be sufficient grounds for disciplinary action ranging from oral reprimand to
23 dismissal depending on the seriousness of the offense and other circumstances related to
24 the situation regarding number 2, disregard for frequent violations of federal laws, state
25 laws, county ordinances VSO standards directives and safety rules. 13, any conduct on
26 or off duty that reflects unfavorably on the county as an employer and 22, any other
27 conduct or action of such seriousness that disciplinary action is considered warranted.
28 And Volusia County Merit System Rules and Regulations 86-43 it says this violation
29 may be sufficient grounds for disciplinary action ranging from oral reprimand to
30 dismissal depending on the seriousness of the offense and other circumstances related to
31 the situation regarding sub c, outside employment, sub 2 it says approval to engage in
32 outside employment must be obtained in writing from the employees appointing
33 authority. If the specific conditions of the outside employment change a new request for
34 approval must be submitted. Failure to secure approved, required approval may cause an
35 employee to be suspended or discharged. Approval will at times be subject to review and
36 cancellation. As a Florida Law Enforcement Officer and Notary Public of the State of
37 Florida I am empowered take sworn statements. At this time, I would ask that you raise
38 your right hand to be sworn. Do you solemnly swear or affirm the statement you're
39 about to give is the truth, the whole truth and nothing but the truth?
40


41 JK Yes sir.

315 JK I don't recall.
16
317 DS It's in there.
318
319 JK I don't think I knew any of that at the time of the or what was the, you add the what?
320
321 DS Did it include age, sex and physical size of the suspect involved?
322
323 JK I don't believe so.
324
325 DS Ok did it include the suspect's proximity to weapons?
326
327 JK No.
328
329 DS Alright did it include any medical treatment or the offer of medical treatment?
330
331 JK No.
332
333 DS Alright was the suspect arrested?
334
335 JK No.
336
337 DS Why not?
38
339 JK I don't know. Port Orange is the investigating agency.
340
341 DS But you, you indicated that you didn't want to pursue charges right?
342
343 JK Correct.
344
345 DS Ok. Why didn't you want to pursue charges?
346
347 JK Because I live there and the kid's 21 on his 21st birthday. I'm not trying to ruin his life or
348 mine. I live there with my children.
349
350 DS Ok. Have you had any contact with the suspect since the incident occurred?
351
352 JK Yes.
353
354 DS When?
355
356 JK The following day.
357
358 DS Ok did you talk about the incident with him?
359
60 JK We did.

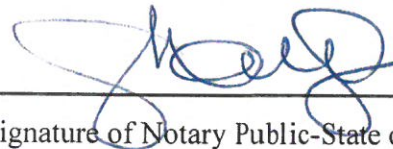
407 JK No.
08
409 DS Ok. That's all the questions that I have is there anything that you guys would like to
410 discuss or any clarification questions you'd like to ask?
411
412 GW Just a couple. Sgt. Kraker when you spoke with Mr. Wehr the next day.
413
414 JK Uh huh.
415
416 GW Did you approach him or did he approach you?
417
418 JK He approached me.
419
420 GW So you didn't go seeking him out?
421
422 JK No we were actually I was walking out of [REDACTED] and he was walking up
423 I think his girlfriend was with him and he asked if he could speak to me for a minute off
424 to the side and his girlfriend went in I said sure. We went off to the side and he basically
425 was like look man I'm, I really don't remember much what happened last night I'm really
426 sorry I you know I shouldn't have treated you this way kind of thing and you know I feel
427 really bad and you know I shouldn't you know no one should be treated that way
428 especially a cop. You know I actually knew you from you know because we've seen
429 each other a couple times at the pool because we [REDACTED] but he's like,
30 and he's just basically very apologetic you know and then he was asking me he's like you
431 know what really happened I don't really know what happened I was you know I don't
432 remember much of it so I basically just told him what I told you guys and he was you
433 know just very apologetic you know thank you I'm sorry you know no one should be
434 treated that way kind of thing and then we shook hands and, I've run into him like two or
435 three times in passing since but.
436
437 GW And when he approached you did he tell you that a bald headed lieutenant had already
438 come out and talked to him that day?
439
440 JK He said someone had come out to speak to him at some point.
441
442 GW And was that before he apologized to you or after do you remember? In other words did
443 he say yeah and somebody else has already come and talk to me when he approached you
444 and apologized to you.
445
446 JK Yes.
447
448 GW Ok so someone from this agency, not you because you're also bald headed right?
449
450 JK Correct.
451
'52 GW Had already come and talked to him.

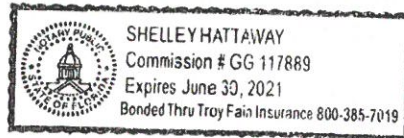
I, Lt. Daniel Shivers swear that the forgoing is an accurate transcription of the sworn recorded statement of Sgt. Jacob Kraker taken by me on August 24, 2020.

(Signed)

 Lt. Daniel Shivers 60842

Sworn to and subscribed before me this 24 Day of August, 2020.


Signature of Notary Public-State of Florida



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

My Commission Expires:

My Commission Number is:

Personally Known

Produced identification

Type of Identification Produced

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

CASE NO. 2021 100481 CFDL

STATE OF FLORIDA

VS.

JACOB YOUNG KRAKER
_____ /

NOLLE PROSEQUI

The State of Florida, by and through the undersigned Assistant State Attorney, announces and hereby files this, its **NOLLE PROSEQUI** with respect to the above-styled case now pending in this Court; and by said action, the following charge(s) are dismissed():

PERJURY IN OFFICIAL PROCEEDING

Dated December 2, 2021, at DELAND, VOLUSIA County, Florida.

POLICE DEPARTMENT NO. VOLUSIA COUNTY SHERIFF'S OFFICE/VC SOIA 20-013

s/SARAH THOMAS

ASSISTANT STATE ATTORNEY
FLORIDA BAR NO. 119419
251 NORTH RIDGEWOOD AVENUE
DAYTONA BEACH, FL,32114
ESERVICEVOLUSIA@SAO7.ORG
(386) 239-7710

PHYSICAL EVIDENCE:

X ***** **ARREST IS SUFFICIENT SANCTION** ***** IS NO LONGER NEEDED FOR COURT AND MAY BE DISPOSED OF ACCORDING TO LAW.

_____ **HOLD FOR FURTHER COURT PROCEEDINGS AND/OR INSTRUCTIONS.**

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

CASE NO: 2021 302879 CFDB

STATE OF FLORIDA

VS.

**JAMES RUSSELL LEONE,
DEFENDANT.**

FILED
2022 MAR 16 PM 3:01
CLERK OF THE CIRCUIT
& COUNTY VOLUSIA CITY, FL

STATE'S TRAVERSE TO DEFENDANT'S MOTION TO DISMISS

COMES NOW, R.J. Larizza, State Attorney for the Seventh Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney files this traverse to Defendant's Motion to Dismiss filed 1/26/2022, requesting this Honorable court to summarily deny Defendant's motion pursuant to Florida Rule of Criminal Procedure 3.190(d), and as grounds therefore would show as follows:

Procedural History

Counsel for defense filed a Motion to Dismiss under Rule 3.190(c)(4) on 1/26/2022. The Motion is properly certified, signed, and notarized, dated 1/26/2022. Counsel for defense filed an addendum to the motion on the same day 1/26/2022. Recognizing the requirement under rule 31.90(d) the state files this timely traverse.

1. Admit in part and Deny in part. The state recognized that prior to Dec 2020 the Defendant was an attorney in the State of Florida. Defendant on October 23, 2020, signed a PETITION FOR DISCIPLINARY REVOCATION WITH LEAVE TO APPLY FOR READMISSION represented by Brett Alan Greer Esq., E-Filed on October 23, 2020, in the Supreme Court of Florida. (copy attached as exhibit A). The Supreme Court of Florida entered an Order on December 17, 2020, (copy attached as exhibit B) granting the uncontested Petition of Defendant for a disciplinary revocation, as provided by Rule 3-7.12, Rules Regulating the Florida Bar with leave to seek readmission after 5 years. The State is not privy to information as to whether the Defendant was considered "a licensed attorney" during the term of the investigation. The State requests this court take Judicial Notice of the Court filings, Orders, and Florida Statutes referred to herein or attached as Exhibits pursuant to F.S. 90.201, Matters Which Must Be Judicially Noticed and F.S. 90.202 (6) & (7) Matters Which May Be Judicially Noticed.

2. Denied. This statement goes toward the state of mind of the Defendant and/or his knowledge or belief. This is not a factual statement that may be proven or disproven under the law.
3. Admit.
4. Admit.
5. Denied. The defendant did not, in November 2018, nor at any time before or thereafter obtain or possess any interest in the real property at [REDACTED] Florida. The defendant created [REDACTED] as admitted by Defendant in this Motion to Dismiss and held by Circuit Judge Weston on July 2, 2020 (copy of Order attached as exhibit C). The Defendant did intend to unlawfully deprive the rightful owner [REDACTED] the victim in this case of his possession and ownership of said real property. The Defendant posted No Trespass warnings concerning this property claiming legal possession and ordering the rightful owner [REDACTED] to leave the residence where he was residing by December 9, 2018, or be subject to removal, arrest and lawsuit. (copy attached as exhibit D). The Defendant was trying to obtain possession and ownership of the named property through the unlawful and fraudulent application of Florida Statutes concerning adverse possession and redemption of unpaid property taxes. The Defendant went as far as to specifically name the victim [REDACTED] within the language of the posted trespass warnings.
6. Admit in part and Deny in part. Articles of incorporation were filed by the Defendant for [REDACTED] However, the legality of the LCC's formation or declaration as an LLC is in dispute.
7. Admit in part and Deny in part. The Defendant did list [REDACTED] [REDACTED] as well as his address. However, the Defendant had no legal authority or lawful possession/rights over the property to list the [REDACTED] address as his own or for the corporate entity he had just created.
8. Admit.
9. Admit.
10. Admit in part and Deny in part. The document falls within the bounds and jurisdiction of the Department of State.
11. Admit.
12. Deny. The language states in its entirety: "for residential structures, a person who occupies or attempts to occupy a residential structure solely by claim of adverse passion prior to making a return, commits trespass under S. 810.08, F.S. A person who occupies or attempts to occupy a residential structure solely by claim of adverse possession and offers the property for lease to another commit's theft under s. 812/014. F.S." This language does not imply that an individual may occupy the property simply by filing out and returning this document. The document requires information to be provided about how the property will be used, or has been used. The language within the document at the section "Legal description of property claimed," reads that "must be full and complete. If the property appraiser cannot identify the property from the legal description, you may be required to obtain a survey. This language is indicative that the return of form itself does not grant any legal interest in the property and is just one requirement that needs to be met.
13. Admit in part and deny in part. The Defendant did write in the Reponses as indicated by the motion, however the State reserves the right to contest the responses as to truthfulness.
14. Admit.

15. Deny by default. The State cannot confirm nor deny this statement.
16. Deny. [REDACTED] had been living at the property with his mother for some time before her death. He is an heir to the property and listed as Executor in his mother's Will which left him an interest in the property, although no probate has been conducted. This statement goes to the knowledge/belief of the Defendant and therefore is not a statement of fact.
17. Admit as to the filing and Deny in part. The Defendant claimed possession of the property on November 30, 2018, in his unlawful and fraudulent attempt to begin the adverse possession process and attempted to eject and threatened trespass charges against the rightful owner as evidenced in exhibit D attached hereto.
18. Deny. This statement is not a fact within the record and clearly contrary to Florida law. This statement goes toward the State of mind and intention of the Defendant.
19. Admit in part and Deny in part. Admit that Defendant did follow through with his initial threat and file a lawsuit seeking ejectment against the rightful owner. Deny that there is any support or Florida Statutes that permit Defendant's unlawful and fraudulent acts that have instead resulted in his revocation to practice law in Florida and the instant criminal charges.
20. Deny. This statement goes to the knowledge/belief of the Defendant and therefore is not a statement of fact. The actions of Defendant indicate a carefully calculated plan utilizing Florida Statutes inappropriately in an unlawful and fraudulent manner and then now caught claim ignorance, which is not a defense for a layman much less a practicing attorney with years of experience.
21. Deny. The Information has been Amended by the State and now includes a third count of Grand Theft.
22. Deny. Each charge often requires additional information and changes to be made including but not limited to changing the actions being alleged of the accused, the statutory numbers themselves, the "is applicable" sections most often included in any Florida Standardized Jury Instructions for each charge. Some Charges have to be completely imputed into the information tracking the statutory language. The Defendant's contention is a misstatement as to the functionality of the system as well as the requirements for the operator.
23. Deny. The Prosecutor has the authority to adjust the language of the information within the bounds of the statutory requirements by law.
24. Deny. Discovery has been sent and the information has been amended since the original filing of the Defense Motion, however discovery is on-going.
25. Admit.
26. Admit in part and Deny in part. The victim [REDACTED] was awarded Attorneys Fees by the Court in the extraordinary dismissal of Defendant's lawsuit as being totally without merit. The offer of Pre -Trial Intervention has been rejected by Defendant and withdrawn by the State. A new Amended Information with a third count of Grand Theft has been filed. The Defendant's right to practice law has been revoked as a result of his actions, however he could continue to represent himself using this same or similar fraudulent and unlawful schemes to take property from another unsuspecting rightful owner. The Defendant selects his victims by looking for individuals that are economically and emotionally vulnerable, exploiting this time in their lives to fraudulently and unlawfully try to take their homes. The innocent victim in this case [REDACTED] has a right under Florida law to be made whole and any restitution should be made to [REDACTED] After the

death of his mother he was forced to incur significant legal expenses to defend his property and himself from the predatory actions of Defendant. If a conviction is obtained in this case the Court will determine the amount of restitution to be awarded to the victim [REDACTED] in accordance with Florida law.

27. Admit.
28. Admit in part, that an Order was entered by Judge Weston but Deny Defendant attempted to file a legally sufficient claim. Florida Law clearly and concisely states that filing with the clerk a Return under F.S. 95.18 does not create any interest enforceable by law in the described property. In fact the form itself filed by the Defendant and executed by him under penalty of perjury has printed on it in bold letters **“THIS RETURN DOES NOT CREATE ANY INTEREST ENFORCEABLE BY LAW IN THE DESCRIBED PROPERTY”** (a copy of the Return filed by Defendant is attached as exhibit E) The entirety of the judgement would be a more sufficient and correct statement as to the Courts ruling which has been previously alluded to in this traverse and is identified as exhibit C attached. To quote the exact language from the pertinent part of the Order **“Even if every factual allegation is taken to be true, Plaintiff’s Amended Complaint fails to establish any legal basis whatsoever for Plaintiff’s claimed right of entitlement to a possessory interest in the real property that is the subject of this action”.**
29. Deny. The charges are based on the statutory language. Count I has since been amended to include the portion of the language regarding jurisdiction within the Department of State.
30. Admit in part and Deny in part. The Statement made by the Defense in an attempt to limit the jurisdiction of the State Department is an inaccurate statement of fact by omission.
31. Admit in part and Deny in part. The Statement made by the Defense in an attempt to limit the jurisdiction of the Department or revenue is an inaccurate statement of fact by omission.

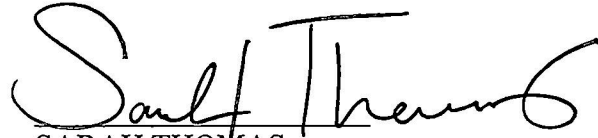
ARGUMENT

The State would reserve response on the enumerated sections which are concededly labeled “argument” rather than fact.

While the State contends that a Motion to Dismiss brought under Florida Rule of Criminal Procedure 3.190(c)(4) is not the proper vehicle to challenge the issue of statutory interpretation and legal analysis, there are material factual allegations denied above to overcome the C4 standard for the purpose of this traverse.

The State is prepared to present additional case law by way of oral argument and would request a hearing on any matter not addressed specifically in this motion or denied by default. This motion has been made timely and procedurally correct. Some denials contained in this Traverse are made due to interpretation and inference, both allowed by this rule. The State respectfully requests the Defendant’s Motion to Dismiss be Denied.

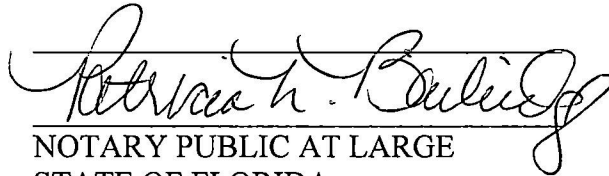
WHEREFORE, the State moves this Honorable Court to deny the Defendant's Motion to Dismiss.



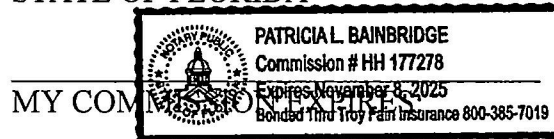
SARAH THOMAS
ASSISTANT STATE ATTORNEY
Florida Bar No.: 119419
251 N. RIDGEWOOD AVE.
DAYTONA BEACH, FL 32114
ESERVICEVOLUSIA@SAO7.ORG

Personally appeared before me Sarah Thomas, 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 the allegations set forth in the foregoing traverse and demurrer are based upon facts that have been sworn to as true. Subscribed in good faith. Said facts based on testimony of material witnesses.

SWORN to and subscribed before me on this 16 day of March, 2022



NOTARY PUBLIC AT LARGE
STATE OF FLORIDA



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to MICHAEL LAMBERT, 428 NORTH HALIFAX AVENUE, DAYTONA BEACH, FL 32118, via electronic service, on MARCH 31, 2020.



SARAH THOMAS
ASSISTANT STATE ATTORNEY
Florida Bar No.: 119419
251 N RIDGEWOOD AVENUE
DAYTONA BEACH, FL 32114
(386) 239-7710
ESERVICEVOLUSIA@SAO7.ORG

EXHIBIT A

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Supreme Court Case No. SC-

The Florida Bar File No.

IN RE:
THE PETITION FOR DISCIPLINARY
REVOCATION OF JAMES RUSSELL
LEONE

Petitioner.

**PETITION FOR DISCIPLINARY REVOCATION WITH LEAVE TO
APPLY FOR READMISSION**

COMES NOW Petitioner, James Russell Leone, and submits this Petition for Disciplinary Revocation pursuant to Rule Regulating Fla. Bar 3-7.12 and states:

1. Petitioner knowingly and voluntarily submits this petition with leave to reapply for readmission after 5 years with full knowledge of its effect.

2. Petitioner is 77 years old and has been a member of The Florida Bar since July 25, 1985, and is subject to the jurisdiction of the Supreme Court of Florida and the Rules Regulating The Florida Bar.

3. Petitioner has no prior discipline history.

4. The following disciplinary charges are currently pending against the Petitioner:

A. In The Florida Bar File Number 2019-30,586 (7A), The Florida Bar opened an investigation after receiving a complaint alleging that Petitioner

misled or misrepresented facts or law to a nonlawyer relating to property [REDACTED]

[REDACTED] over which Petitioner was asserting a legal interest for his client.

Petitioner believed that his client's legal right to control possession of the property was superior to all except the deceased record owner. Petitioner later filed an action for ejectment, seeking removal of the nonlawyer, that is, the person residing at the property. The trial court found Petitioner had failed to establish any legal basis for Petitioner's client's claimed right of entitlement to a possessory interest in the [REDACTED] property. Petitioner had previously represented clients in at least seven similar matters wherein Petitioner's wife would locate vacant property with past due property taxes. Petitioner would then form a Florida limited liability company (LLC) specific to that property and pay the past due taxes. Petitioner would file a DR-452 form with the local property appraiser providing notice of adverse possession of the property and then either reside at the vacant property with his wife or transfer ownership of the LLC (and thus the LLC's purported possessory interest in the property) to a third party in exchange for money. At all times Petitioner believed he was arguing in good faith for a novel construction or good faith modification of existing law.

5. Petitioner contends that granting this Petition will not adversely affect the public interest, the integrity of the courts, or the confidence of the public in the

legal profession. Further, Petitioner contends that granting this Petition will not hinder the administration of justice.

6. Petitioner agrees to reimburse the Client Security Fund (CSF) for any and all funds CSF has paid or may pay out for claims resulting from Petitioner's misconduct.

7. Petitioner agrees to reimburse The Florida Bar for the costs incurred in his disciplinary cases.

8. Petitioner agrees to submit to a complete audit of any trust account(s) and any other account(s) in which Petitioner has placed client funds, if requested to do so by The Florida Bar.

9. Petitioner further agrees to submit a sworn financial affidavit to The Florida Bar attesting to Petitioner's current personal and professional financial circumstances on a form to be provided by The Florida Bar within thirty (30) days, if requested.

10. Petitioner further agrees to maintain a current mailing address with The Florida Bar for a period of five (5) years after the disciplinary revocation becomes final. Further, Petitioner shall keep the bar advised as to the physical address of Petitioner's home and/or business in the event Petitioner should utilize a post office box or other type of mail drop service during the five (5) year period after the disciplinary revocation becomes final.

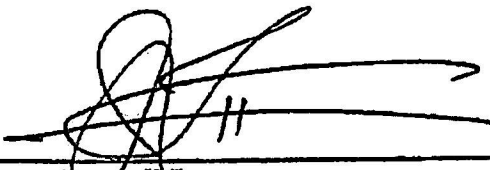
11. Petitioner agrees to eliminate all indicia of petitioner's status as an attorney on social media, telephone listings, stationery, checks, business cards office signs or any other indicia of his status as an attorney, whatsoever. Petitioner will no longer hold himself out as a licensed attorney.

12. Petitioner understands that the granting of this petition by the Supreme Court of Florida shall serve to dismiss all pending disciplinary cases.

WHEREFORE, Petitioner respectfully requests that this Court grant this Petition and order that Petitioner's membership in The Florida Bar be revoked with leave to seek readmission.

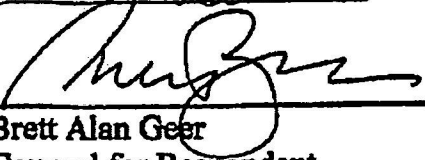
Respectfully submitted,

Dated this 23^d day of October, 2020.



James Russell Leone
Respondent
1594 Ross Dr
Deltona, FL 327385024
(386) 847-1293
Florida Bar ID No.: 486183
jrleoneattorney@gmail.com

Dated this 23 day of October, 2020.



Brett Alan Geer
Counsel for Respondent
3030 N. Rocky Point Dr. W., Ste. 150
Tampa, FL 336077200

(813) 961-8912
Florida Bar ID No.:
brettgeer@geerlawfirm.com

CERTIFICATE OF SERVICE

I certify that this document has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida; with copies provided via United States Mail to Joshua E. Doyle, Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; to Karen Clark Bankowitz, Bar Counsel, The Florida Bar, 1000 Legion Place, Suite 1625, Orlando, FL 32801, via email at kbankowitz@floridabar.org; and to Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, via email at psavitz@floridabar.org; on this 23 day of October, 2020.



Mr. Brett Alan Geer

EXHIBIT B

Supreme Court of Florida

THURSDAY, DECEMBER 17, 2020

CASE NO.: SC20-1553

Lower Tribunal No(s):
2021-30,220 (07A) (CDR)

IN RE: PETITION FOR DISCIPLINARY REVOCATION OF
JAMES RUSSELL LEONE

The uncontested petition for disciplinary revocation, as provided by Rule 3-7.12, Rules Regulating the Florida Bar, with leave to seek readmission after five years, is granted subject to the continuing jurisdiction of this Court. *See Florida Bar v. Ross*, 732 So. 2d 1037, 1040-42 (Fla. 1998). Disciplinary revocation is tantamount to disbarment. *Florida Bar v. Hale*, 762 So. 2d 515 (Fla. 2000). The disciplinary revocation shall be effective thirty days from the date of this order so that petitioner can close out his practice and protect the interests of existing clients. If petitioner notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the revocation effective immediately. Petitioner shall fully comply with Rule Regulating the Florida Bar 3-5.1(h). Petitioner shall also fully comply with Rule Regulating the Florida Bar 3-6.1, if applicable. In addition, petitioner shall accept no new business from the date this order is filed until he is readmitted.

CASE NO.: SC20-1553

Page Two


Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from James Russell Leone in the amount of \$1,250.00, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined. The filing of a motion for rehearing shall not alter the effective date of this revocation. As with disbarment, in seeking readmission to The Florida Bar, petitioner "may be admitted again only upon full compliance with the rules and regulations governing admission to the bar." R. Regulating Fla. Bar 3-7.10(n).

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



ca

Served:

BRETT ALAN GEER
KAREN CLARK BANKOWITZ
PATRICIA ANN TORO SAVITZ

EXHIBIT C

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

CASE NO. [REDACTED]
DIVISION: 2

[REDACTED]

Defendant.

FINAL JUDGMENT

THIS CAUSE came before the Court for hearing on Defendant's Motion for Judgment on the Pleadings (Doc. #20), Plaintiff's Response to Defendant's Motion for Judgment on the Pleadings (Doc. #21), and Plaintiff's Objection to Defendant's June 18 Submissions of case law ("Plaintiff's Objection") (Doc. #24). Defendant's Motion to Dismiss, Motion to Strike, and Motion for Sanctions (Doc. #12) was noticed for hearing but was not heard. The Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. Plaintiff's Objection is OVERRULED.
2. To prevail in an action for unlawful detainer, a plaintiff, among other things, must demonstrate entitlement to possession of the subject real property. § 82.03(1), FLA. STAT. (2019). Even if every factual allegation is taken to be true, Plaintiff's Amended Complaint fails to establish any legal basis whatsoever for Plaintiff's claimed right of entitlement to a possessory interest in the real property that is the subject of this action. Accordingly, Defendant's Motion for Judgment on the Pleadings is GRANTED.

3. Final judgment is entered for the Defendant and against the Plaintiff. Plaintiff shall take nothing by this action and Defendant shall go hence without day.

4. The Court reserves jurisdiction to enforce this judgment and to determine entitlement to and the amount of an award of attorney's fees and court costs.

DONE and ORDERED in Chambers at Deland, Volusia County, Florida.

7/2/2020 1:42 PM 2020 10245
Katlyn D. Dwyer

e-Signed 7/2/2020 1:42 PM 2020 10245 CIDL
CIRCUIT JUDGE

Copies via e-Service to:



James R. Leone, Esq. (jrleoneattorney@gmail.com, jrleoneattorney@yahoo.com)

EXHIBIT D

NO TRESPASSING ON THIS LAND

THIS AREA IS A DESIGNATED CONSTRUCTION SITE. ANYONE TRESPASSING ON THIS PROPERTY SHALL, UPON CONVICTION, BE GUILTY OF A FELONY.

Any approach to or entry on these premises is subject to posted notices, etc.

However

[REDACTED]
[REDACTED] are hereby granted a license at no charge for transient space accommodation under FSS 82.035, up to but no later than **4 PM SUNDAY December 9, 2018.**

Thereafter, anyone upon these premises shall be guilty of trespass and upon Affidavit/Sworn Complaint subject to removal or arrest by law enforcement officers, and lawsuit for mandatory trespass damages and injunction, unless expressly permitted by the undersigned.

James R. Leone, Attorney At Law, [REDACTED] (a Florida Limited Liability Company)
which has legal possession of this property pursuant to FSS 95.18, including FSS 95.18(9)
386-847-1293, JRLEONEATTORNEY@GMAIL.COM

(Post at corners and 500' or less apart along boundaries, clearly noticeable from outside the premises.)

Fla. Stat. Sec. 810.08 and 810.09. © 2003, 2008, 2018 J.R. Leone 386-847-1293, JRLEONEATTORNEY@GMAIL.COM

EXHIBIT E



RETURN OF REAL PROPERTY IN ATTEMPT TO ESTABLISH ADVERSE POSSESSION WITHOUT COLOR OF TITLE

Section 95.18, Florida Statutes

DR-452
R. 07/13
Provisional
Effective 01/14

FLORIDA

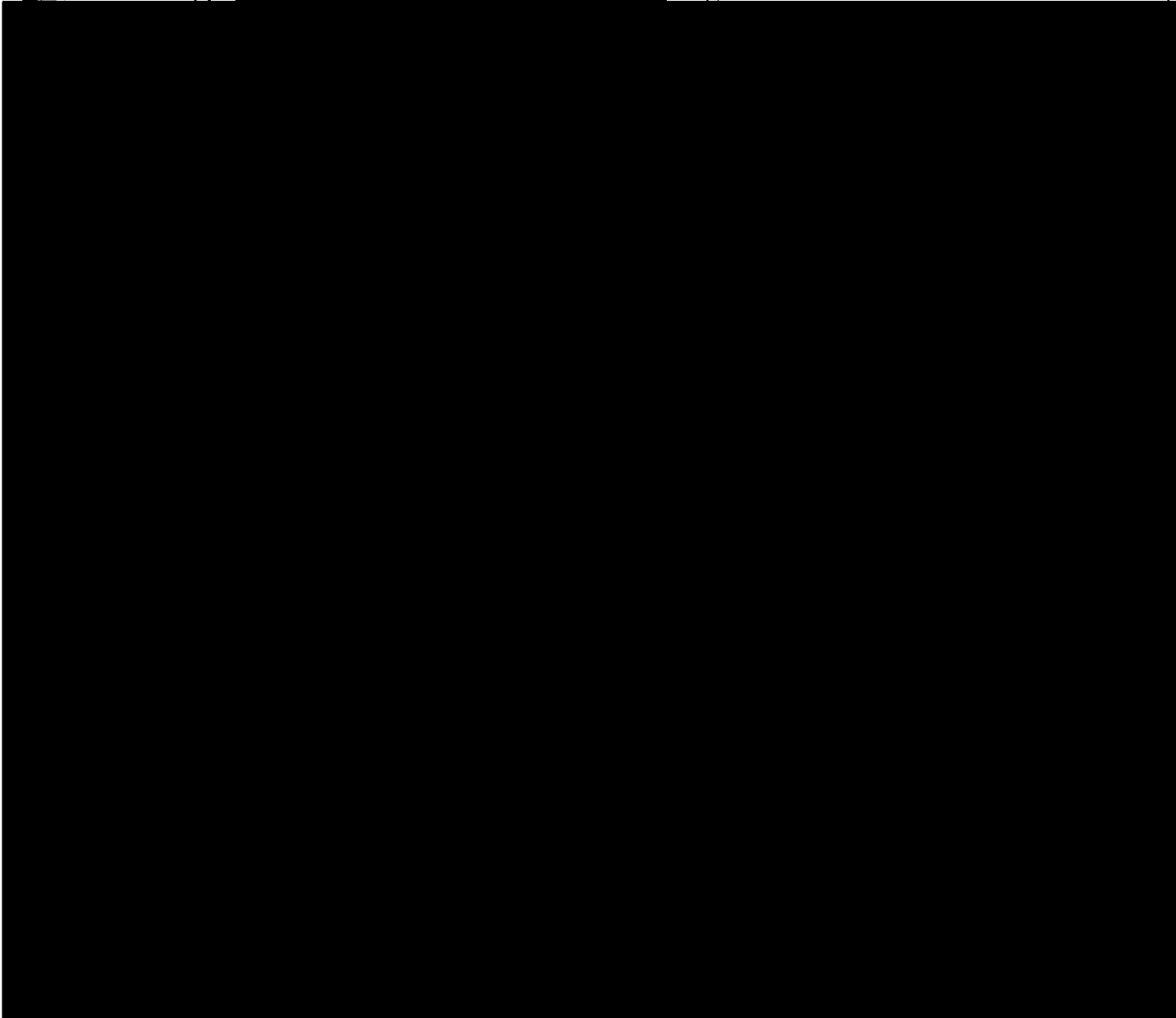
THIS RETURN DOES NOT CREATE ANY INTEREST ENFORCEABLE BY LAW IN THE DESCRIBED PROPERTY

For residential structures, a person who occupies or attempts to occupy a residential structure solely by claim of adverse possession prior to making a return, commits trespass under s. 810.08, F.S. A person who occupies or attempts to occupy a residential structure solely by claim of adverse possession and offers the property for lease to another commits theft under s. 812.014, F.S.

COMPLETED BY ADVERSE POSSESSION CLAIMANT

The person claiming adverse possession (claimant) must file this return with the property appraiser in the county where the property is located as required in s. 95.18(1) F.S.

Name of claimant(s)



TO THE OWNER OF RECORD:

A tax payment made by the owner of record before April 1 the year after the taxes were assessed will have priority over a payment made by the claimant. An adverse possession claim will be removed if the owner of record or tax collector furnishes a receipt to the property appraiser showing payment of taxes by the owner of record during the period of the claim. (S. 95.18, F.S.)

This return is a public record and may be inspected by any person under s. 119.01, F.S.

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

STATE OF FLORIDA

CASE NO.: 2021-302879-CFDB

VS.

JAMES RUSSELL LEONE,
Defendant.

_____ /

SECOND AMENDED MOTION TO DISMISS

COMES NOW the Defendant, James Leone, by and through his undersigned counsel, and hereby amends is previously filed Motions to Dismiss dated July 2, 2021 and January 26, 2022, pursuant to Rule 3.190(b), FRCrP, and as follows:

1. The Amended Information filed in this cause fails to state the **essential facts** constituting the offense charged, in violation of Rule 3.140(d)(1), FRCrP.
2. Counts I and II of the Amended Information filed herein is each vague and indefinite, in violation of Rule 3.140(b), FRCrP, and the Defendant cannot prepare his defenses thereto.
3. In Counts II and III of the Amended Information filed herein, each is so ambiguous that the Defendant may be subjected to double jeopardy or duplicitous prosecutions.
4. Count III of the Amended Information is not based upon sworn testimony from a material witness.
5. The Defendant, James Leone, is charged in a three count Amended Information, and as follows:

Count I - Make False Statement to Department of State

“In that James Russell Leone, on or about November 30, 2018, in the County of Volusia and State of Florida, in a matter within the jurisdiction of the Department of State, did knowingly and willfully falsify or conceal a material fact, make any false, fictitious, or

fraudulent statement or representation, or make or use any false document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, contrary to Florida Statute 817.155 (3 DEG FELONY)”.

Count II - Organized Scheme to Defraud > \$20,000

“In that James Russell Leone, on or about November 30, 2018, in the County of Volusia and State of Florida, did engage in a scheme constituting a systematic, ongoing course of conduct with the intent to defraud one or more persons, or with the intent to obtain property from one or more persons by false or fraudulent pretenses, representations, or promises, or willful misrepresentations of a future act, and thereby obtained property, to wit: a residence, or did attempt to do such an act to obtain such property, which had an aggregate value of \$20,000 or more, let but less than \$50,000, from one or more of such persons, contrary to Florida Statute 817.034(4)(a)2 and 777.04(1). (3 DEG FEL)”.

Count III - Grand Theft Over \$20,000

“In that James Russell Leone, on or between November 30, 2018, and July 2, 2020, in the County of Volusia and State of Florida, did knowingly obtain or use, or endeavor to obtain or use PROPERTY of a value of \$20,000.00 or more, which was the property of [REDACTED] or any other person not the defendant(s), with the intent to permanently or temporarily deprive [REDACTED] or any other person not the defendant(s) of the property or benefit therefrom or to appropriate the property to the use of JAMES RUSSELL LEONE or to the use of any person not entitled thereto, contrary to Florida Statute 812.014(2)(b)1 and 812.014(1). (2 DEG FEL)”

6. Count I of the Amended Information alleges a multiple choice conclusionary only violation of Florida Statute §817.155, occurring on November 30, 2018 within the jurisdiction of the Department of State.

7. The State of Florida by its generic regurgitation of the statutory verbiage of §817.155, has alleged 16 alternative ways by which the Defendant, James Leone, violated the statute, i.e.:

- (a) Did knowingly and willfully falsify a material fact;
- (b) Did knowingly and willfully conceal a material fact;
- (c) Did knowingly and willfully make any false statement;
- (d) Did knowingly and willfully make any fictitious statement;
- (e) Did knowingly and willfully make any fraudulent statement;
- (f) Did knowingly and willfully make any false representation;
- (g) Did knowingly and willfully make any fictitious representation;
- (h) Did knowingly and willfully make any fraudulent representation;
- (i) Did knowingly and willfully make any false document;
- (j) Did knowingly and willfully use any false document;

And in doing so, Leone knew the same to contain:

- (i) any false statement;
- (ii) any fictitious statement;
- (iii) any fraudulent statement;
- (iv) any false entry;
- (v) any fictitious entry; or
- (vi) any fraudulent entry.

8. In Count II of the Amended Information, the State does not list “a scheme constituting a systematic, ongoing course of conduct with the intent to defraud” that Leone committed. Here too, the State has alleged that Leone’s offense occurred on November 30, 2018.

9. Also in Count II of the Amended Information, the State of Florida alleges a violation of Florida Statute §817.034(4)(a)2 **and** §777.04(1) (not “or”), which it labels “Organized Scheme to Defraud > \$20,000, which is a second degree felony; however, the State denoted it a third degree felony despite alleging that Leone **obtained** property. The State of Florida is, and has been, well aware that Leone did not obtain any property.

10. Though the State may allege in the alternative in its charging document, it may only do so, and as sworn to by its author, “... that the allegations set forth in the foregoing Information (sic) **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. **Said facts are based upon testimony of material witnesses.**” (Pages 1 and 2 of the Amended Information) (Emphasis added)

11. Remarkably, in Count II of the Amended Information, the State swore that based upon the sworn testimony of a material witness Leone obtained a residence. Contrarily, in paragraph 5 of the State's Traverse, also under oath, is the statement that Leone never obtained or possessed any interest in the property.

12. Additionally, Count II of the Amended Information does not list the "one or more persons" from whom the residence was either obtained or attempted to be obtained.

13. As to Count III of the Amended Information, despite its "on or between November 30, 2018 and July 2, 2020", the State of Florida has affirmatively elected only "on November 30, 2018" as it has done with Counts I and II of the Amended Information, as reflected in its response to discovery.

WHEREFORE, the Defendant, James Leone, respectfully requests this Honorable Court to dismiss Counts I and II of the Amended Information herein as fatally defective in that they do not apprise the Defendant, James Leone, of what it is **factually** that he is alleged to have done, and to whom. (See Rule 3.140(d)(1))

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by electronic delivery, to Office of the State Attorney, on this the 23rd day of March, A.D., 2022.

LAMBERT LAW

/s/ Bryan G. Lambert

MICHAEL H. LAMBERT, ESQUIRE

Florida Bar No. 0188156

BRYAN G. LAMBERT, ESQUIRE

Florida Bar No. 0097988

428 North Halifax Avenue

Daytona Beach, Florida 32118

(386) 255-0464

Office@LambertLaw.us

FOR IMMEDIATE RELEASE

January 24, 2024

CONTACT: Travis Mydock, Chair
Seventh Circuit Judicial Nominating Commission
Phone: (904) 864-3002
Email: tmydock@mydocklaw.com

**SEVENTH CIRCUIT JUDICIAL NOMINATING COMMISSION
CERTIFIED LIST FOR APPOINTMENT TO THE CIRCUIT COURT**

SAINT AUGUSTINE, Fla. – The Seventh Circuit Judicial Nominating Commission interviewed nineteen (19) applicants for the purpose of selecting and submitting a list of highly qualified lawyers for appointment to the Circuit Court. This appointment will fill the vacancy created by the resignation of Judge Raul Zambrano.

Following deliberations and thoughtful consideration of each applicant, the Commission certifies to Governor Ron DeSantis the following individuals for appointment (listed in alphabetical order according to their last name and without any preference):

Phillips, Ann
Pickens III, Robert
Simonsen, Michele
Thomas, Sarah
Urbanak, Andrew
Wainer III, David

The Commission sincerely thanks all of those who participated in the nomination process. Input from the community by way of reference, recommendations, or general information about the applicants is vital to the process; the Commission thanks you.

cc: Chief Judge Leah Case, Seventh Judicial Circuit

Seventh Circuit Judicial Nominating Commission:

Travis Mydock, B.C.S. (Chair)
Casey Arnold, Esq.
Andrew Morgan, Esq.
Raven Sword, Esq.

Terence White, Esq. (Co-Chair)
Kelly Parsons Kwiatek, Esq.
John Reid, B.C.S.
Erica Tesh White, Esq.

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