Application for Nomination to the Circuit Court of the Seventh Judicial Circuit

Arthur Christian Miller

APPLICATION FOR NOMINATION TO THE SEVENTH JUDICIAL CIRCUIT

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: Arthur Christian Miller **Social Security No.:** [redacted]

Florida Bar No.: 0023211 **Date Admitted to Practice in Florida: 4/18/2006**

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

   State of Florida / Volusia County Judge
   101 N. Alabama Ave., Suite C-337
   DeLand, Florida 32724
   (386) 626-6592

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]

   I have lived at this address since December 2007, and I have lived in Florida since 2003.

3. State your birthdate and place of birth.

   I was born on [redacted]**, in Norfolk, Virginia**

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

   Yes

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

The Florida Bar; admitted April 18, 2006. I have never been suspended or resigned.

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

I have been known as "Chris" all my life.

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).

School	Class Standing / GPA	Dates of Attendance	Degree (date)
Stetson University College of Law, Gulfport, Florida	46/102 2.95 GPA	Jan. 2003 – Dec. 2005	J.D. (Dec. 2005)
University of Tennessee, Knoxville, Tennessee	Rank unknown[1] 3.42 GPA	Aug. 1997 – May 2001	B.A. Political Science (May 2001)
Oakland High School, Murfreesboro, Tennessee	43/415 3.619 GPA	Aug. 1993 – May 1997	H.S. Diploma (May 1997)

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.

***Phi Kappa Psi* social fraternity, Member (1998 – 2001), President (1999 – 2000)**
Intramural flag football referee, University of Tennessee (Fall 1998)
Moot Court Board, Stetson University College of Law (2004 – 2005)
Teaching Fellows, Stetson University College of Law (2004 – 2005)

EMPLOYMENT:

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

Employer	Job Title	Dates	Contact	Description
State of Florida	County Judge	Mar. 2018 – present	101 N. Alabama Ave., Ste. C-337, DeLand, FL 32724	

[1] Class rank was requested but was not available from institution.

State Attorney's Office, 7th Judicial Circuit	Assistant State Attorney	July 2011 – Feb. 2018	251 N. Ridgewood Ave., Daytona Beach, FL 32114	
McCullough, Morgan & Kurak, P.A. (now closed)	Associate Attorney	Mar. 2011 – June 2011	3121 Opportunity Cir., Ste. D, South Daytona, FL 32119	
State Attorney's Office, 7th Judicial Circuit	Assistant State Attorney	Mar. 2006 – Mar. 2011	251 N. Ridgewood Ave., Daytona Beach, FL 32114	
Public Defender's Office, 6th Judicial Circuit	Certified Legal Intern	Aug. 2005 – Dec. 2005	Pinellas County Justice Center, 14250 49th St. N., Clearwater, FL 33762	
Dickinson & Gibbons, P.A.	Law clerk	May 2005 – Aug. 2005	401 N. Cattleman Rd., Ste. 300, Sarasota, FL 34242	
Donna Feldman, P.A. (now Feldman & Mahoney, P.A.)	Law clerk	July 2004 – Mar. 2005	2240 Belleair Rd., Ste. 210, Clearwater, FL 33764	
CompUSA, Inc. (now closed)	Sales rep.	Dec. 2001 – Dec. 2002	719 Thompson Way, Nashville, TN 37204; no phone number available	Sold computers and other electronics
Dell, Inc.	Sales rep.	Aug. 2001 – Nov. 2001	1 Dell Parkway, Nashville, TN 37217; 1-888-335-5663, option 1	Sold Dell computers by telephone
CVS Pharmacy	Pharmacy Technician	Mar. 2000 – Aug. 2001	607 SE Broad St., Murfreesboro, TN 37130; (615) 896-0393	Filled prescriptions

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

I have been assigned to a criminal division since January 2022. In that role, I conduct all required hearings in a wide variety of misdemeanor cases from first appearances to jury trials and violation of probation hearings. I also assist my colleagues throughout the circuit by covering for other circuit and county judges. I have covered Marchman and Baker Act proceedings, felony jury trials, as well as other circuit criminal and civil proceedings.

I have also been the Administrative Judge for Volusia County since July 2021. As such, I run monthly meetings of the county judges, handle internal administrative duties as assigned by the Chief Judge, and generally act as a liaison between the court and its many partners

including the Clerk's Office, State Attorney's Office, Public Defender, Probation, and the jail.

The first four years I was on the bench, I was assigned to a county civil docket, which encompassed a wide variety of cases including evictions, small claims, contract and insurance disputes, replevin, traffic cases, and many other civil matters.

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

Court			Area of Practice		
Federal Appellate		%	Civil	40	%
Federal Trial		%	Criminal	60	%
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:

Prior to becoming a judge in 2018, I was an assistant state attorney for 12 years where I prosecuted a wide variety of cases from misdemeanors to first degree murder.

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

Jury?	70 (lawyer) 19 (judge)	Non-Jury?	5 (lawyer) 200+ (judge)
Arbitration?	0	Administrative Bodies?	0
Appellate?	0		

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.

None.

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.*

Below is a list of the last six jury trials I presided over as a judge.

Case Style/Number	**Attorneys**
State v. Christopher Bula 2023-305261 CFDB	Boone Forkner (State); (386) 239-7710; forknerb@sao7.org Sara Altes (Defense); (386) 239-7730; altes.sara@pd7.org Odell Brown (Defense); (386) 239-7730; brown.odell@pd7.org
State v. D'Markious Noel 2023-101185 MMDL	Jenifer White (State); (386) 622-6400; whitej@sao7.org Camille Martin (Defense); (386) 597-9904; camille@martinlaw.org
State v. Amadeo Miles 2023-103251 MMDL	Lucas Lee (State); (386) 622-6400; leel@sao7.org Camille Martin (Defense); (386) 597-9904; camille@martinlaw.org
State v. David Brown 2022-105748 MMDL	Lucas Lee (State); (386) 622-6400; leel@sao7.org Judith Jenson (Defense); (386) 522-5770; jensen.judi@pd7.org Lee Stephens (Defense); (386) 522-5770; stephens.lee@pd7.org
State v. Alec Bergman 2023-105686 MMDL	Lucas Lee (State); (386) 622-6400; leel@sao7.org James Smith (Defense); (386) 522-5770; smith.james@pd7.org Judith Jensen (Defense); (386) 522-5770; jensen.judi@pd7.org
State v. Zachary Morrisey 2023-104510 MMDL	Cameron Brookfield (State); (386) 622-6400; brookfieldc@sao7.org David Webster (Defense); (407) 862-9222; dwebsterlaw@gmail.com Samantha Lambert (Defense); (407) 862-9222; samantha@thewebsterlawoffice.com

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 been a sitting judge for the past five years.

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

I have appeared in court on a near-daily basis for the past five years.

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.

Not applicable. See answers to Questions 16-18 above.

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

Not applicable.

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

State of Florida vs. Montario Royals	
Case No.	2010-031818 CFAES
Judge:	Hon. R. Michael Hutcheson (retired)
State Counsel:	Applicant (1st chair); Mike Willard (386) 239-7710; willardm@sao7.org
Defense Counsel:	Christopher L. Smith (407) 898-5151; chris@omaralawgroup.com
Trial dates:	May 22, 2012

5th DCA Case No.:	5D12-4405 (Affirmed – Per Curiam)

The victim was a handicapped young man who was robbed and tortured at gunpoint in his own home. The Defendant was a former Marine, but despite his military service, he went on a violent crime spree. The Defendant was convicted at trial and sentenced to life in prison, concurrent with another life sentence he was serving on an unrelated murder charge.

This case was significant to me for a few reasons. It was one of the first violent felony cases that I tried as the lead counsel for the State. As such, I spent a lot of time and effort preparing dilligently for the trial to ensure I was ready to present a comprehensive, convincing case to the jury. I met with the lead detective several times to review the evidence and tour the scene of the crime. I also met with the victim to prepare him for his difficult testimony at trial. These experiences reinforced the value of hard work in preparing for court and the resulting positive impact it had on my work product. I still apply these lessons today on the bench by preparing before each court hearing to make sure I understand the issues and am prepared to rule promptly.

State of Florida vs. Al Rue Hopkins	
Case No.	2011-035980 CFAES
Judge:	Hon. Raul Zambrano (retired)
State Counsel:	Applicant (1st chair) & Laura Coln (deceased)
Defense Counsel:	Matthew Phillips (386) 453-7868; matthewphillips10502@gmail.com Allison Hughes (386) 822-5770; hughes.allison@pd7.org
Trial dates:	April 15 - 18, 2013
5th DCA Case No.:	5D13-1471 (Affirmed – Per Curiam)

This was a DUI Manslaughter case with two deaths, and the Defendant had three previous DUI convictions. The Defense alleged the victims caused the accident leading to their deaths, therefore the case involved significant use of an expert accident reconstructionist and forensic DNA evidence to refute the defense. After a four-day jury trial, the Defendant was convicted and sentenced to 30 years in prison, and his driving privileges were permanently revoked.

This case was significant to me primarily because of the facts of the case and the resulting loss to the victims' families. However, because the defense related to causation, I focused a lot of my time and attention during the case on interpreting and applying the language of the DUI Manslaughter statute. The State does not have to prove that the defendant was the sole cause of the victim's death, just that he caused *or contributed to* the death(s). This case was an excellent primer for my role as a judge in interpreting statutes and rules.

State of Florida vs. Justin Duvall	
Case No.	2012-001651 CFAWS
Judge:	Hon. R. Michael Hutcheson (retired)
State Counsel:	Applicant (1st chair) & Celeste Gagne [redacted]; [redacted]
Defense Counsel:	Martin K. Leppo (deceased) Theodore Barone (508) 584-0411; baronelawoffice@gmail.com
Trial dates:	April 21 - 29, 2014
5th DCA Case No.:	5D14-1973 (Affiirmed – Per Curiam)

This Defendant killed the victim with a shotgun and then fled the scene on foot through a nearby park. Both circumstantial and direct evidence tied the Defendant to the crime scene. The trial lasted 7 business days. Opposing counsel were very skilled and thoroughly challenged the State's evidence at every turn. Prosecuting the case increased my knowledge of forensic evidence, which I was able to integrate into a persuasive closing argument. The jury returned a verdict of guilty as charged after just 16 minutes of deliberations. The Defendant was sentenced to life in prison.

This case was significant to me because it was my first murder trial, and the trial occurred before I was promoted to the dedicated Homicide Investigations Unit of the State Attorney's Office. I was added to the case as a second chair shortly before the trial began, and therefore, I had to get up to speed quickly. It required a lot of hard work and intense preparation, which are skills still relevant to my current job as a judge.

State of Florida vs. Kenneth Bronson	
Case No.	2013-301317 CFDB
Judge:	Hon. R. Michael Hutcheson (retired)
State Counsel:	Applicant
Defense Counsel:	Kenneth Hamburg (407) 389-5140; khamburg@rc5state.com
Trial dates:	August 19-20, 2014
5th DCA Case No.:	5D14-3693 (Affirmed – Per Curiam)

This case was a brutal rape and false imprisonment of a young woman with a history of prostitution and drug use. The case involved complex legal and factual issues including similar fact and DNA evidence. The jury rejected the Defendant's consent defense after I presented evidence that he attempted to break the victim's neck when she resisted his assault. This was an emotional case, especially in light of his history of preying on vulnerable women in society. The Defendant was convicted and sentenced to 25 years in prison.

This case was significant due to the difficulty in securing justice for prostitutes and drug users, who often remain silent about their sexual assaults for this reason. Many juries are skeptical of their claims of nonconsenusal sex. However, this case reaffirmed my commitment to treating everyone with dignity and respect, no matter their background.

State of Florida vs. Justin Boyles	
Case No.	CF13-01221
Judge:	Hon. J. Michael Traynor (retired)
State Counsel:	Applicant (1st chair) & Travis Mydock (904) 864-3002; tmydock@mydocklaw.com
Defense Counsel:	Jim Hernandez (904) 651-7707; lawjimhernandez@aol.com
Trial dates:	December 7-14, 2015
5th DCA Case No.:	5D16-410 (Affirmed – Per Curiam)
This murder was very violent and involved a torture, beating, and arson death as a result of a love triangle gone terribly wrong. I had to use a forensic anthropologist and a dentist to help establish the victim's identify during trial. My co-counsel was instrumental in finding evidence on surveillance footage from traffic cameras that corroborated a key state witness's testimony. This case was significant to me because it was my first murder trial after being officially promoted to the Homicide Investigations Unit, and it was my first ever jury trial in St. Johns County. Although I had tried many jury trials before in Volusia County, trying a high-stakes case in an new courthouse was an unfamiliar experience. It helped me appreciate the feelings many litigants, witnesses, and even jurors must feel when they are in a courtroom for the first time, an experience I still remember today when dealing with people coming through the court system.	

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.

See attached writing samples for which I was the sole author at Tab 22.

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.

Governor Rick Scott appointed me to the Volusia County bench on February 9, 2018, and I officially started on March 1, 2018. I was successfully elected to the same position in August

2020 following a contested election in which I received almost 60% of the votes cast in my race.

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

I previously submitted two applications to the 7th Circuit JNC for the vacancies created by the retirement of Judge Shirley Green and the elevation of Judge Steven Henderson. The applications were submitted in November and December 2017, and my name was certified to the Governor's Office for consideration for both vacancies. Both appointments were made at the same time, and I was selected by Governor Scott to fill one of the vacancies.

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.

Not applicable.

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;

Name	Address	Phone Number
Aaron Delgado	227 Seabreeze Blvd., Daytona Beach, FL 32118	(386) 255-1400
Camille Martin	847 Orange Ave., Ste. E, Daytona Beach, FL 32114	(386) 597-9904
Richard Zaleski	211 E. International Speedway Blvd., Ste. 206, Daytona Beach, FL 32118	(386) 310-2011
Jenifer White	101 N. Alabama Ave., DeLand, FL 32724	(386) 822-6400
Cameron Brookfield	251 N. Ridgewood Ave., Daytona Beach, FL 32114	(386) 239-7710
Judith Jensen	101 N. Alabama Ave., DeLand, FL 32724	(386) 822-5770

(ii) the approximate number and nature of the cases you handled during your tenure;

In the almost seven years I have been a judge, I have handled several thousand cases. The misdemeanor cases have included drug possession, domestic assault and battery, contracting without a license, animal abuse, DUI and other criminal traffic matters. The nature of the civil cases included evictions, small claims matters, contract and insurance disputes, civil traffic infractions, torts, declaratory judgment actions, as well as many post-judgment matters.

(iii) the citations of any published opinions; and

***State of Florida v. Juan Diaz*, 30 Fla. L. Weekly Supp. 365a**

***Apex Auto Glass, LLC v. Progressive Select Ins. Co.*, 29 Fla. L. Weekly Supp. 677a**

***Target National Bank v. Kathleen Jones*, 28 Fla. L. Weekly Supp. 72b**

***MRI Associates of Lakeland, LLC v. Progressive American Ins. Co.*, 27 Fla. L. Weekly Supp. 971a**

***Mentor Chiro. Rehab Ctr. Inc. v. Progressive American Ins. Co.*, 27 Fla. L. Weekly Supp. 730a**

***Emery Medical Solutions, Inc. v. Progressive Select Ins. Co.*, 27 Fla. L. Weekly Supp. 726b**

***Emery Medical Solutions, Inc. v. USAA Casualty Ins. Co.*, 27 Fla. L. Weekly Supp. 641a**

***Emergency Physicians, Inc. v. USAA Casualty Ins. Co.*, 27 Fla. L. Weekly Supp. 389a**

***John Charnesky v. Betsy Orefice*, 27 Fla. L. Weekly Supp. 386a**

***John Charnesky v. Betsy Orefice*, 27 Fla. L. Weekly Supp. 385a**

***Advantacare of Florida, LLC v. Progressive Select Ins. Co.*, 27 Fla. L. Weekly Supp. 291a**

***Emergency Physicians, Inc. v. USAA Casualty Ins. Co.*, 27 Fla. L. Weekly Supp. 67a**

***Emergency Physicians, Inc. v. USAA Casualty Ins. Co.*, 27 Fla. L. Weekly Supp. 66b**

***New Smyrna Imaging, LLC v. State Farm Mutual Auto. Ins. Co.*, 27 Fla. L. Weekly Supp. 66a**

***Emergency Physicians, Inc. v. USAA Casualty Ins. Co.*, 26 Fla. L. Weekly Supp. 893b**

***Celpa Clinic, Inc. v. Century National Ins. Co.*, 36 Fla. L. Weekly Supp. 400a**

***Emergency Physicians, Inc. v. Garrison Property & Casualty Ins. Co.*, 26 Fla. L. Weekly Supp. 301a**

***Tampa Bay Emergency Physicians, PL v. Windhaven Ins. Co.*, 26 Fla. L. Weekly Supp. 300b**

(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.

***Jasmine Reyes v. Mobiloans, et al.*; 2020-16482 CODL**

Plaintiff Attorney – Bryan Geiger, Esq.
Defense Attorney – Michael Furbush, Esq.

Dates: July 2020 – April 2022

In the *Reyes* case, the Plaintiff sued a corporate entity and several of its executives alleging their payday loan service charged a usurious interest rate prohibited under Florida law. The case turned on whether the Defendants were members of an Indian tribe (as their tribal laws allowed much higher interest rates than permitted in Florida) and were thus entitled to sovereign immunity. After allowing the parties brief jurisdictional discovery, I conducted a lengthy and factually intense inquiry, ultimately concluding all Defendants were entitled to immunity. My order of dismissal is one of my writing samples included at Tab 22.

This matter was significant because it tested my ability to follow and apply the law, even when the outcome could seem unjust, and I may have personally preferred a different outcome. It also required the application of a multi-pronged federal standard that I had not previously encountered. The lawyering on both sides was exceptional.

***State v. George Raisler*; 2022-105271 MMDL**

Plaintiff Attorney – Lucas Lee, Esq.
Defense Attorney – Donald Dempsey, Esq.

Dates: November 2022 – March 2024

In the *Raisler* case, the Defendant was accused of shoving the victim at a city commission meeting after the victim (an outgoing commissioner) was leaving the dais following his departing remarks. Although thankfully no one was injured, the case was heavily contested due, in part, to the conflicting political alliances among the parties. Following a lengthy evidentiary hearing, I dismissed the case based upon Florida's Stand Your Ground laws.

This matter was significant because the parties were very emotionally invested in their positions, thus increasing the pressure on my ultimate decision. Like the *Reyes* case above, this was another example of my commitment to following the law as written, despite personal reservations about the outcome.

***St. Germain Chiro. v. State Farm*; 2017-20810 CONS**

Plaintiff Attorney – Doug Walker, Esq. (now Judge Walker, Orange County)
Defense Attorney – Justin Seekamp, Esq.

Dates: March 2017 – August 2019

Although an otherwise ordinary PIP lawsuit, this case presented an opportunity to certify a question as being of great public importance and affecting the uniform administration of justice. The underlying issue was whether the word "affirmatively," as used in the Small Claims lack of prosecution rule, affected the type of activity required to preclude dismissal for prolonged inactivity. The analysis required me to do a deep dive on decades of revisions to the rules, and the seminal cases interpreting them. In a civil division, the lack of prosecution rules are very important tools for effective case management.

This matter was significant because it allowed me to think deeply and write about the meaning of specific words in a commonly used rule, which is a very useful exercise for a trial judge tasked with interpreting and applying statutes and rules daily.

***State of Florida v. Juan Diaz*; 2021-105460 MMDL**

Plaintiff Attorney – Elba Roman-Pacheco, Esq.
Defense Attorney – Aaron Delgado, Esq.

Dates: December 2021 – July 2022

In the *Diaz* case, the Defendant was charged with driving under the influence. The Defense challenged the traffic stop raising an issue with the deputy's conclusion that the Defendant had violated a particular statute regarding lights on the rear of a vehicle. My order is one of my writing samples included at Tab 22.

This matter was significant because it required me to conduct significant statutory interpretation without the benefit of appellate case law on point, which is unusual in criminal law.

***State of Florida v. David Luncsford*; 2022-101247 MMDL**

Plaintiff Attorney – Vanessa Lee, Esq.
Defense Attorney – Robert Rawlins, Esq.

Dates: March 2022 – September 2023

In the *Luncsford* case, the Defendant was charged with contracting without a license. The Defendant entered a not guilty plea and proceeded to a jury trial. Due to the nature of Florida's contracting/licensure laws, the jury instructions had to be specially crafted based upon the facts of this specific case. The jury found the Defendant guilty as charged and he was sentenced to probation and to pay the victim restitution.

This case was significant because these types of cases do not often go to a jury trial in county court. The law is more complex than an average criminal statute. Therefore, to prepare for trial I had to spend a lot of time studying the statutory requirements that applied to this case. It also required great attention to detail to ensure the final jury instructions were legally accurate so that both sides received a fair trial.

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.

***Colantonio, et al. v. Moog*, 326 So.3d 807 (Fla. 5th DCA 2021)**

In this case, I granted summary judgment for the appellee on an unlawful detainer claim brought against several people living in a house she recently purchased from a third party. The appellate court reversed based upon the appellant's affidavit alleging someone forged his name on the deed conveying the property to the third party that later sold to the appellee. The appellate court held this created an issue of fact precluding summary judgment applying the old summary judgment standard. However, the appellate court upheld my finding of personal jurisdiction over the appellant.

***Mooney v. Dempsey,* 2019-10012 APCC (copy attached at Tab 27)**

The Circuit Court acting in its appellate capacity partially reversed my amended final judgment in a commercial eviction case. The Circuit Court held that I erred in finding that a second lease equitably reformed the first lease. I made no such finding, and in fact wrote, "the court need not decide whether the [previous] lease was valid or capable of reformation." Unfortunately, the appellant below did not seek to clarify this issue or move for rehearing. The amended final judgment was affirmed in all other respects.

***Lake Mary Chiro. v. Geico*; 2018-10048 APCC (copy attached at Tab 27)[2]**

This was one of several PIP cases dealing with a very common issue regarding the proper rate of reimbursement for a charge submitted to the insurer in an amount less than the fee schedule amount, and whether the insurer had to pay the full amount submitted, or only 80% of the "billed amount." I held that the insurer was required to reimburse the provider in the full amount billed, as opposed to 80% of the amount billed, according to my interpretation of the policy and statutory language. Although I was originally affirmed by the circuit appellate panel, the Fifth District reversed.

[2] I issued virtually identical opinions in several different PIP cases on the same issue and was reversed in each for the same reason. For the sake of brevity, the named case is listed in a representative capacity.

The issue was also recently ruled upon (in favor of the insurer) by the Florida Supreme Court in *Allstate Ins. Co. v. Revival Chiro., LLC*, 385 So.3d 107 (Fla. 2024).

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.

I have ruled on several routine search and seizure issues in motions to suppress that involve federal and state constitutional issues. One such opinion is included at Tab 28. However, I would not consider any of the opinions significant. None of these opinions have been appealed.

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.

I am not aware of any such complaints having been filed against me.

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.

Not applicable.

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

No.

POSSIBLE BIAS OR PREJUDICE

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

I do not feel that I would have any difficulty presiding over any types of cases, group of entities, or types of litigants.

As a presiding judge, I previously recused myself from any cases involving my wife's former law firm and any cases involving persons or attorneys that played a significant role on my campaign committee. Due to the passage of time, I would no longer automatically recuse myself from either of those groups but would disclose the associations if appropriate.

I also granted one motion to disqualify in a misdemeanor case, because it was legally sufficient. That Defendant sued me and another judge in a separate matter. See answer to Question 53 below.

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.

Although not officially published, I co-prepared a compendium of case descriptions dealing with the various juvenile sentencing issues in homicide cases after *Miller* and *Graham*. It is titled *A Guide to Florida's Juvenile Sentencing Issues after Miller v. Alabama and Graham v. Florida*, and it was last "published" on November 9, 2016. It was distributed internally within the 7th Circuit State Attorney's Office and to other prosecutors' offices in the State of Florida. A copy is attached at Tab 35.

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

None.

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.

Coffee with the Chris's

- **January 2019 (Deland, FL) – *Professionalism/Communication between Judges, Attorneys and Self-Represented Litigants and the Rules/Canons that Guide those Communications*. This presentation targeted younger lawyers in the local legal community and provided guidance for how to effectively handle common issues when interacting with opposing counsel, parties and the courts. I am not aware of any transcripts, recordings, or press coverage of this event.**

- **May 2019 (Daytona Beach, FL) – *Tips & Techniques for Conducting Evidentiary Hearings*. This presentation was also focused on younger lawyers, and it provided them with a view from the bench on what good lawyers do to prepare for and conduct effective evidentiary hearings. I am not aware of any transcripts, recordings, or press coverage of this event.**

- **November 2019 (Deland, FL) – *Handling Small Claims Cases* (CLE approved). This presentation highlighted the differences between the Florida Rules of Civil Procedure and the Florida Small Claims Rules. I am not aware of any transcripts, recordings, or press coverage of this event.**

Summer Educational Conferences

- **July 2019 (Orlando, FL) – *Best Practices Civil Symposium.* This symposium was a panel discussion among county judges across the state addressing several topics in the civil divisions. I was tasked with leading the discussion on handling requests for telephonic appearances for witnesses and/or attorneys (pre-ubiquitous Zoom usage) and handling fee discovery in attorneys fee disputes. I am not aware of any transcripts, recordings, or press coverage of this event.**

- **July 2022 (Bonita Springs, FL) – *Common Evidentiary Issues in County Civil.* This class covered a range of topics county judges frequently encounter in civil divisions including hearsay, the business record exception, judicial notice, the summary judgment standard, and how to apply these concepts when frequently dealing with self-represented litigants. I am not aware of any transcripts, recordings, or press coverage of this event.**

- **July 2022 (Bonita Springs, FL) – *Technology: Navigating the Branch Intranet.* In this presentation, I discussed the features of both the intranet website maintained by the Conference of County Court Judges, as well as the Florida Courts intranet site, and**

the various resources available to the Florida's judges. I am not aware of any transcripts, recordings, or press coverage of this event.

- **July 2023 (Ponte Vedra, FL) – *Best Practices for Criminal Case Management.* In this presentation, I discussed the law and strategies for handling common issues in criminal cases – including the proper framework for resolving discovery violations under *Richardson*, how to property analyze requests for depositions in misdemeanor cases, and how to track defendants previously found incompetent to proceed. I am not aware of any transcripts, recordings, or press coverage of this event.**

- **July 2024 (Naples, FL) – *12 Things Your (Judicial) Viewer Will Do for You.* This presentation focused on highlighting the functionality of different judicial viewers used by judges throughout the state to help judges handle their dockets more efficiently. I am not aware of any transcripts, recordings, or press coverage of this event.**

2020 Campaign related speeches

- **Various campaign related videos (available online at: https://www.youtube.com/@keepjudgechrismiller8607)**

- **Spring/Summer 2020 (Virtual) – *Tiger Bay Club of Volusia County Judicial Candidate Forum*. This candidate forum turned into an informal Q&A session with Tiger Bay members when my opponent refused to participate. I am not aware of any transcripts, recordings, or press coverage of this event.**

- **Spring/Summer 2020 (Virtual) - *Alpha Kappa Alpha Candidate Forum.* This was a forum offered by a local sorority chapter for its members to ask local candidates questions. I am not aware of any transcripts, recordings, or press coverage of this event.**

Miscellaneous

- **September 21, 2022 (Daytona Beach Shores, FL) – *Civil Case Management Standards*. This presentation was given to the 2022 Conference of the Judicial Assistants' Association of Florida along with a colleague. It focused on the role of a judicial assistants in effective case management, and the new case management requirements in civil cases. I am not aware of any transcripts, recordings, or press coverage of this event.**

- **2018 – present (DeLand, FL) – Various Q&A and mock trial events with local school groups. I am not aware of any transcripts, recordings, or press coverage of these events.**

- **May 19, 2021 (Daytona Beach, FL) – *Panelist, Building Association Managers of Volusia*. This was a discussion about Florida's courts held with a group of property managers and representatives from related industries. I am not aware of any transcripts, recordings, or press coverage of this event.**

- **July 15, 2015 (St. Johns County, FL) – *Co-Presenter, 4th and 5th Amendment Issues*. I gave a lecture to the St. Johns County Sheriff's Office Criminal Investigations Division about 4th Amendment search and seizure issues, as well as common 5th Amendment/Miranda rights issues arising during interrogations. I am not aware of any transcripts, recordings, or press coverage of this event.**

- **November 14, 2014 (Flagler County, FL) – *Co-Presenter, Evidentiary Issues in DV Cases*. I gave a lecture to misdemeanor prosecutors discussing evidentiary concerns in domestic violence cases, with a focus on the Florida Evidence Code and the Confrontation Clause of the 6th Amendment. I am not aware of any transcripts, recordings, or press coverage of this event.**

- **November 8, 2013 (Daytona Beach, FL) – *Co-Presenter, 4th Amendment Search/Seizure Issues*. I gave a lecture to new detectives at the Daytona State College Advanced Technology College concerning the fundamental concepts of the 4th Amendment and related search and seizure issues. I am not aware of any transcripts, recordings, or press coverage of this event.**

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.

None.

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.

National Honor Society, Oakland High School, 1994 – 1997
National Beta Club, Oakland High School, 1995
***Beta Epsilon* Honor Society, Oakland High School, 1994**
***Phi Eta Sigma* National Honor Society, University of Tennessee, 1998**
Victor O. Whele Award for Excellence in Trial Advocacy, Stetson Law School, 2005
Top Gun Award, 7th Circuit State Attorney's Office, 2013

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

None.

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.

The Florida Bar

Member, 2006 – present

Volusia County Bar Association

Member, 2006 – present

Volusia Flagler Association of Women Lawyers

Member, 2018 – 2020

Dunn Blount American Inn of Court

Member, 2017 – present
President-Elect, 2019 – 2021
President, 2021 – 2023

Volusia County Teen Court

Volunteer, 2012 – 2014, 2017 - present

Federalist Society

Member, 2018 – 2019, 2023 – present

Conference of County Court Judges of Florida, Inc.

Member, 2018 – present
Circuit Representative, 2019 – 2022
Web Administrator, 2022 – present
Editorial Committee
Member, 2022 – present
Vice Chair, 2024 – present

Florida Courts Education Council
Member, 2024 – present

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.

St. Barnabas Episcopal Church

Member, 2017 – present

Rotary Club of Deland

Member, 2020 – 2023

LPGA International Golf Club

Social Member, 2015 – 2021

Christ Presbyterian Church

Member, 2010 – 2017

Daytona Beach Quarterback Club

Member, 2010

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.

None. I have been a judge for almost seven years and was a prosecutor for the three years preceding my appointment.

45. Please describe any hobbies or other vocational interests.

I enjoy spending time with my family, cooking, traveling, reading, and playing with our yellow lab, Archie. I also used to like playing golf, although I'm not sure anymore.

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.

None.

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

None.

FAMILY BACKGROUND

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

I am married to Katherine Hurst Miller, who serves as a fellow Volusia County Judge. We have been married since December 29, 2007. This is my only marriage.

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.

I have one wonderful daughter, Elizabeth, who is 12 years old.

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.

In February 2001, I was arrested for driving under the influence in Murfreesboro, TN. I cooperated fully, including submitting to a blood alcohol test. The test results showed I was under the legal limit, and the charge was reduced to reckless driving to which I plead guilty on June 7, 2001. I was sentenced to probation, mandatory classes, and ordered to pay court costs and fines. I completed all terms of the sentence successfully. The case number is 75GSI-2001-CR-622182.

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.

See Answer to Question 50 above.

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.

See Answer to Question 50 above.

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.

I was a named defendant in the matter of *Tera Lau v. The Honorable Sandra C. Upchurch and The Honorable A. Christian Miller*. The case number is 2024-11504 CICI. The case was

filed in the Circuit Court of the 7th Judicial Circuit (Volusia County). The Plaintiff sought a declaratory judgment claiming that I violated her due process rights by ordering a series of competency evaluations in her misdemeanor cases. The matter was dismissed with prejudice on May 20, 2024, upon a finding that both Defendants have judicial immunity.

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.

Yes.

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.

When I was appointed to the bench in 2018, I was excited and nervous about the many experiences to come. I was immediately assigned to a civil division, a field in which I had limited experience at the time. But I knew that I could rely upon my new colleagues and my civil litigator wife to help me acclimate quickly. In addition to learning the subject matter, I

had to learn how to *be* a judge. It is not as easy as putting on a robe and walking onto the bench. As I learned, there are seemingly infinite situations judges face for which their legal experience is insufficient preparation. Fortunately, the judicial branch assists new judges through this transition with training and mentoring. I have come to appreciate judicial education, and I have become faculty trained to teach other judges. I teach courses to new and experienced judges, and I serve on the Supreme Court's Florida Courts Education Council.

Running a campaign was also an education for me. Shortly after being appointed, I drew an opponent. After the initial shock wore off, I realized it was pointless to worry about things I cannot control. I knew I had to balance running a campaign with effectively managing a busy civil docket with several thousand cases.

Before this, my only experience with politics was voting regularly and watching political TV shows. Even though I had lived and worked in the Daytona Beach community since graduating law school, my opponent had lived much longer in the area. The 18-month long campaign was arduous and stressful. I attended dozens of festivals, hob-nob's, Chamber events, parades, and meet and greets all over Volusia County (which is larger than Rhode Island). Any opportunity to meet with voters was a must. In addition to all these campaign events, I still had trials and hearings to conduct and orders to write. Despite these challenges, and with the help of a fantastic team of volunteers and campaign staff, we prevailed with almost 60% of the vote. In the end, I am grateful for these experiences and the relationships forged. Being challenged and having to campaign to keep a job you love really makes you appreciate it more. It also crystallizes your philosophy about the job, and why you love doing it.

My judicial philosophy is simple: give everyone a fair hearing, rule promptly, and follow the law. It is informed by my faith, as well as my life experiences as a father, husband, son, lawyer, and judge. Along the campaign trail I heard many stories about people's interactions with the courts – mostly positive, but some negative. One of the most impactful moments came when a woman told me that, although I had ruled against her in court, she would still be voting for me because she felt that I had given her a fair hearing. This interaction solidified the first part of my judicial philosophy. And it reinforced a common adage among experienced judges that holds, "people will remember how you made them feel long after they have forgotten how you ruled."

I have also heard tales of long-delayed trials and rulings over the years, and the resulting hardships these delays have caused in their lives. People are coming to the courts seeking to enforce their God-given rights: parents trying to raise and support their children how they feel most appropriate, small business owners trying to earn a living, and people seeking accountability for their injuries. These stories impressed upon me the very real consequences at stake in people's lives and the urgency of their need for resolution.

My experiences both during the campaign and on the bench solidified my belief in the foundational importance of following the law. This means judges must exercise proper restraint by not inserting issues into litigation that were not raised by the parties. It is the prerogative and duty of the interested parties to frame the issues to be decided by the courts in their disputes, not the other way around. Judges that decide unpled issues stray from their proper role as neutral and detached magistrates, and worse, they violate the fundamental due process rights of the parties to be heard on those issues. Failure to follow the law also results in judges becoming outcome determinative, picking winners and losers based upon their personal preferences divorced from the laws that were put in place by the expressed will of those same citizens turning to the courts to enforce the laws designed to resolve their disputes. It is nothing short of an abuse of the power given to them by the citizenry in the first place.

Judges must also employ a healthy respect for the powers granted to the other branches of government and never confuse those powers as their own. As James Madison observed in *Federalist Paper No. 47*, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Judges who attempt to legislate from the bench, who raise issues the parties chose not to, or who decide that they know what is best for the parties are choosing chaos over order. They are choosing tyranny over liberty. This is what my experiences have taught me, and this is the perspective I would bring to the circuit bench.

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.

When I applied to become a County Judge in 2017, I promised the JNC and the Governor's Office that I would strive to provide every party with a fair hearing and a prompt ruling, and that I would consistently follow and apply the law, even if I did not like the outcome personally. I made the same promises to the voters during my campaign in 2019/2020. As any experienced judge will tell you, it is not always as easy as it sounds. Some days you are tired, and your patience is worn thin. Sometimes the parties do not provide you with sufficient briefing on the issues, and you must do additional research prior to ruling. Sometimes you must rule against a sympathetic party or apply a law that leads to a seemingly unfair outcome. However, even in those circumstances, I have kept my promises.

As my written work reflects, I have demonstrated a commitment to textualism and the rule of law. For instance, in the *Diaz* case (see Tab 22), after determining the plain language of the statute contained a latent ambiguity, I used a dictionary to determine the meaning of the undefined key term as it would have been understood by a reader proficient in the English language at the time of the statute's enactment. In the *Reyes* case (see Tab 22), I issued an order finding the Defendants immune from suit after applying a multi-factored legal analysis, despite my personal reservations about their underlying conduct.

The decisions will only get tougher and more emotionally charged in circuit court. I believe my years of life and legal experience have prepared me well for this new challenge.

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.

The Honorable Joseph Boatwright
Fifth District Court of Appeal
300 S. Beach St., Daytona Beach, FL 32114
boatwrightj@flcourts.org
(386) 947-1530

The Honorable Leah Case, Chief Judge
Seventh Judicial Circuit
251 N. Ridgewood Ave., Rm. 294, Daytona Beach, FL 32114
lcase@circuit7.org
(386) 239-7792

The Honorable James Clayton (Retired)
[redacted]

The Honorable Melissa Distler
Seventh Judicial Circuit
1769 E. Moody Blvd., Bldg. 1, Bunnell, FL 32110
mdistler@circuit7.org
(386) 313-4520

Rev. G. Comforted Keen
St. Barnabas Episcopal Church
319 W. Wisconsin Ave., DeLand, FL 32724
frckeen@gmail.com
(386) 734-1814

The Honorable Christopher Kelly
Seventh Judicial Circuit
101 N. Alabama Ave., DeLand, FL 32724
ckelly@circuit7.org
(386) 822-5016

Patrick J. Kilbane Jr., Esq.
Ullmann Wealth Partners
1540 The Greens Way, Jacksonville Beach, FL 32250
pkilbane@ullmannwealthpartners.com
(904) 280-3700

The Honorable R.J. Larizza, Esq.
State Attorney's Office
251 N. Ridgewood Ave., Daytona Beach, FL 32114
larizzar@circuit7.org
(386) 239-7714

The Honorable Terence Perkins (Retired)
1769 E. Moody Blvd, Bunnell, FL 32110
[redacted]

Michelle Suskauer, Esq.
Diamond Kaplan & Rothstein, P.A.
515 N. Flagler Dr., Ste. 350
West Palm Beach, FL 33401
michelle@dkrpa.com
(561) 671-1920

CERTIFICATE

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

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

Dated this 22 day of October, 20 24.

Arthur C. Miller
Printed Name

Arthur C Miller
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: $152,319.40

   Last Three Years: $180,616.00 $172,015.00 $172,015.00

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: $152,319.40

   Last Three Years: $180,616.00 $172,015.00 $172,015.00

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

   Current Year-To-Date: N/A

   Last Three Years: N/A N/A N/A

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: N/A

   Last Three Years: N/A N/A N/A

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: N/A

   Last Three Years: N/A N/A N/A

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 June 9, 2024 was $430,237.60.

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 $ 55,750.00

ASSETS INDIVIDUALLY VALUED AT OVER $1,000:

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)	VALUE OF ASSET
Mutual Fund/Def. Comp. [American Target Retire 2045 R4 (RDHTX)]	112,045.84
Personal Residence (address redacted)	350,000.00
Bank of America Checking	18,540.98
Bank of America Savings	8,013.26
CitBank Savings	65,720.58

PART C - LIABILITIES

LIABILITIES IN EXCESS OF $1,000 (See instructions on page 4): NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
Northpointe Bank, 3333 Deposit Dr. NE, Grand Rapids, MI 49546	167,105.00

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE: NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
n/a	n/a

PART D - INCOME

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

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

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

NAME OF SOURCE OF INCOME EXCEEDING $1,000	ADDRESS OF SOURCE OF INCOME	AMOUNT
State of Florida	200 E. Gaines St., Tallahassee, FL	180,616.08

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
n/a			

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

	BUSINESS ENTITY #1	BUSINESS ENTITY #2	BUSINESS ENTITY #3
NAME OF BUSINESS ENTTITY	n/a		
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.

Arthur C. Miller

SIGNATURE

STATE OF FLORIDA

COUNTY OF Volusia

Sworn to (or affirmed) and subscribed before me this 22nd day of October, 2024 by Arthur C. Miller

(Signature of Notary Public—State of Florida)

Karen Lloyd

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

Personally Known X *OR* Produced Identification ____

Type of Identification Produced ____

KAREN LLOYD
Commission # HH 568551
Expires July 9, 2028

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: 10/22/2024

JNC Submitting To: 7th Circuit JNC

Name (please print): Arthur Christian Miller

Current Occupation: Judge

Telephone Number: (386) 626-6592 Attorney No.: 0023211

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.

Arthur Christian Miller

Printed Name of Applicant

Arth C. Miller

Signature of Applicant

Date: 10/22/2024

Tab 22
Writing Samples

IN THE COUNTY COURT FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff, CASE NO.: 2021 105460 MMDL

v.

JUAN ALFREDO DIAZ,
Defendant.
_____ /

ORDER SUPPRESSING EVIDENCE FROM UNLAWFUL TRAFFIC STOP

This matter is before the court on the *Defendant's Motion to Exclude and Suppress Evidence Following an Unlawful Traffic Stop and Inadmissible Field Sobriety Exercises* ("Motion to Suppress") filed on April 14, 2022. The court has reviewed the Motion to Suppress and the court file, conducted a hearing on July 8, 2022, and considered the evidence, arguments and authorities cited by the parties. Based upon the foregoing, the court finds as follows:

The Defendant challenges[1] the lawfulness of the traffic stop. He argues Deputy Maletto did not possess probable cause to believe a traffic infraction had occurred, nor reasonable suspicion of criminal activity. The State argues Deputy Maletto had probable cause to believe the Defendant violated Florida Statute 316.224(3), or in the alternative, Defendant's driving pattern taken as a whole gave Deputy Maletto reasonable suspicion of DUI to justify an investigatory detention. The court analyzes these arguments below.

Probable Cause of Traffic Violation

The only traffic law violation alleged by Deputy Maletto as a basis for the traffic stop is a violation of Florida Statute 316.224(3), which reads as follows:

[1] Based upon the court's ultimate ruling that the traffic stop was unlawful, it does not reach the other issues raised by the Defendant's Motion.

> All lighting devices and reflectors mounted on the rear of any vehicle shall display or reflect a red color, except the stop light or other signal device, which may be red, amber, or yellow, and except that the light illuminating the license plate shall be white and the light emitted by a backup lamp shall be white or amber. Deceleration lights as authorized by s. 316.235(6) shall display an amber color.

The evidence at the suppression hearing demonstrated that the Defendant's Nissan pickup truck displays a pair of factory-issued white cargo lights mounted on the outside, rear portion of the passenger cab, directly above the rear window in front of the truck bed ("the cargo lights"). The cargo lights are positioned on either side of a third brake light and contained within the same housing assembly. *See Diagram A*[2].

Diagram A

Deputy Maletto alleges the cargo lights were noncompliant with the above Florida Statute because they emitted a white color and did not qualify for one of the statute's permitted exceptions. Thus, the issue before the court is whether Florida Statute 316.224(3) applies to cargo lights like those pictured above. The resolution of this issue turns on the meaning of the phrase "the rear of

[2] The included photo is for demonstrative purposes only as it is not a photograph of the Defendant's truck. However, it does appear to be substantially like the Defendant's truck, as displayed in a still frame from Deputy Maletto's body worn camera or dash camera footage displayed during the hearing. Neither party introduced any video evidence from this traffic stop at the Motion to Suppress hearing.

any vehicle" as used in the above statute. Defendant argues the rear of any vehicle includes only the rearmost portion of the vehicle where the brake lights, backup lights, turn signals, tag lights, et cetera are located. Defendant further argues the cargo lights on his truck, although rear facing, are not truly located on the rear of the vehicle, as contemplated in the statute. The State encourages the court to take the broadest view of the statutory term "the rear of any vehicle" and to include any lights mounted on any portion of a vehicle facing to the rear. Such a construction of the statute would therefore include the cargo lights on Defendant's truck.

The court begins this analysis, as with all questions of statutory interpretation, with the language of the statute itself. "When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, it must be given its plain and obvious meaning." *USAA Cas. Ins. Co. v. Mikrogiannakis*, ____ So.3d ____, p.3 (Fla. 5th DCA July 22, 2022) (internal citations omitted). As the Florida Supreme Court recently noted, "the goal of interpretation is to arrive at a fair reading of the text by determining the application of the text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." *Lab. Corp. of America v. Davis*, 339 So.3d 318 (Fla. 2022) (internal citation omitted). The Court also noted "'Context is a primary determinant of meaning.'" *Id. citing Scalia & Garner, Reading Law: The Interpretation of Legal Texts 56 (2012).* Therefore, this court must consider the whole text of the statute, "in view of its structure and of the physical and logical relation of its many parts." *Id.*

The statute at issue addresses color requirements for various lamps, reflectors and lights commonly found on vehicles operating on Florida's roadways. It contains four separately numbered paragraphs, the first three[3] of which are substantive. The first paragraph requires various named lamps and reflectors "mounted on the front or on the side near the front of a vehicle"

[3] The statute's fourth paragraph establishes the penalty for a violation.

to display an amber color. Fla. Stat. 316.224(1). The second paragraph requires various named lamps and reflectors "mounted on the rear or on the sides near the rear of a vehicle" to display a red color. Fla. Stat. 316.224(2). Paragraph three, however, is structured more broadly than the first two. The first clause of paragraph three's first sentence establishes, "All lighting devices and reflectors mounted on the rear of any vehicle shall display or reflect a red color…." Fla. Stat. 316.224(3). The remaining portions of paragraph three carve out exceptions to its general requirements. *Id.*

After this preliminary reading of the statute, it would appear the State's interpretation should prevail – after all this part of the statute indicates it applies to "all lighting devices" mounted on the rear of "any vehicle." *Id.* However, contained within the same clause is the descriptive phrase "mounted on the rear of any vehicle." This modifying language limits the otherwise broad language of the statute's applicability. The question remains, however, what is the "rear" of a vehicle as that term is used in the statute? The court next looks to the context of the whole statute.

The content and wording of the exceptions listed in paragraph three provides some insight. The first exception concerns "the stop light or other signal device," which are permitted to be red, amber, or yellow. *Id.* The second exception addresses "the light illuminating the license plate," which are required to be white. *Id.* The third exception focuses on "the light emitted by a backup lamp," which are required to be white or amber. *Id.* And the fourth exception concerns "deceleration lights[4]," which must display an amber color. *Id.*

The common theme of these named exceptions is their location on a vehicle. Each of these specific lights are located on the rearmost portion of the vehicle – either on the bumper (tag lights) or in taillight assemblies immediately behind the rear quarter panels (backup lamps, stop lights,

[4] Deceleration lights are those found on a bus designed to "caution[] following vehicles that the bus is slowing, preparing to stop, or is stopped." Fla. Stat. 316.235(6). The statute also dictates the deceleration lights shall be placed "on the rear of the vehicle" along with other specified placement and operational requirements. *Id.*

signal devices). None of these specific examples listed in the statute's exemptions are located where the cargo lights on the Defendant's truck are located – in the middle of the vehicle, immediately behind the passenger cabin (albeit rear facing).

Language in paragraph two of the statute provides further insight. Paragraph two also focuses on lamps and reflectors "mounted on the rear" of a vehicle. Fla. Stat. 316.224(2). However, paragraph two goes a step further and uses slightly different wording – "mounted on the rear *or on the sides near the rear* of a vehicle…" *Id.* (emphasis added). This modified language signals slightly broader applicability. Therefore, it would seem the narrower limiting descriptive phrase in paragraph three ("mounted on the rear of any vehicle") focuses that portion of the statute's application on just those lights and reflectors located on the rearmost portion of a vehicle. The juxtaposition of different modifying phrases so close together within the same statute surely is not meaningless. *See Williams v. State*, 244 So.3d 356, 360 (Fla. 1st DCA 2018) (noting "the court must give full effect to all statutory provisions and avoid readings that would render a part of a statute meaningless….").

Nevertheless, the court recognizes the wording in the statute could be considered ambiguous, particularly as applied to cargo lights in pickup trucks like the Defendant's. Unsurprisingly, the statute does not define the term "rear." Nor does Chapter 316's definition section (s. 316.003) contain a definition for the term. Additionally, the court has been unable to find any case law interpreting the meaning of the term, and the parties have not provided any to the court[5].

[5] The only appellate case citing to Fla. Stat. 316.224 is *Vasta v. State*, 662 So.2d 1327 (Fla. 2d DCA 1995), which was provided by the State. *Vasta* dealt with a neon yellow tag light, which the court found was a violation of subsection three of the statute. *Id.* at 1328. However, as the focus in this case is on the Defendant's cargo lights, which are indisputably located at a different place on the vehicle, *Vasta* is distinguishable.

Florida Statute 316.224 was initially enacted in 1971. *See Chapter 71-135, Laws of Florida*. Remarkably, the relevant language has not changed since its original enactment. At the time this statute was first enacted, the noun "rear" was defined as "1: the back part of something … 2: the space or position at the back." *Webster's New Collegiate Dictionary* (7th ed. 1970). Similarly, *The American Heritage Dictionary of the English Language* defined the term "rear" as follows: "1. The hind part of something. 2. The point or area *farthest from the front* of something …." (School ed. 1970) (emphasis added). *See Broward County v. Florida Carry, Inc.*, 313 So.3d 635, 639 (Fla. 4th DCA 2021) (recognizing courts can look to dictionaries to "ascertain the plain and ordinary meaning of a word" where the legislature has not defined a word used in a statute).

Applying this definition of the term "rear" to the statute's language, it is clear the Defendant's interpretation should prevail. A fair reading of the statute's language, by a reasonable reader competent with the English language, would have understood the statutory requirements at issue in this case to apply only to those lights and reflectors mounted at the back or rearmost points of the vehicle. Thus, Florida Statute 316.224(3) does not apply to the rear facing cargo lights mounted in the middle of the Defendant's truck. That Deputy Maletto could have reasonably concluded the law required otherwise is of no moment. *See State v. Wimberly*, 988 So.2d 116, 119 n.2 (Fla. 5th DCA 2008) (noting that an officer's mistake of law, no matter how reasonable, cannot provide grounds for objectively reasonable probable cause).

Reasonable Suspicion of Criminal Activity

Having concluded that Deputy Maletto did not have probable cause to believe the Defendant committed a traffic violation, the court must now analyze whether Deputy Maletto observed sufficient facts to develop a "founded suspicion" of criminal activity. *State, Dept. of Highway Safety and Motor Vehicles v. DeShong*, 603 So.2d 1349, 1352 (Fla. 2d DCA 1992).

In addition to the purported traffic violation, Deputy Maletto also observed the following driving pattern over the course of approximately a half mile, which formed the basis of his conclusion that criminal activity was afoot:

- The Defendant's cargo lights, which are manually operated, were turning on and off at "irregular" intervals.
- The Defendant left his turn signal on for an "unusual" amount of time after completing a lane change.
- While navigating a right-hand curve in the roadway, the driver's side tires struck the dashed white line separating the left and right northbound lanes of travel.
- The vehicle then drifted back across the lane (within the same lane of travel) and the passenger's side tires struck the solid line on the outer edge of the lane of travel.

On cross examination, Deputy Maletto commendably agreed that, although unusual, there was nothing erratic, dangerous, or unsafe about the Defendant's driving pattern. Additionally, the Defendant pulled over within a reasonable time after Deputy Maletto initiated the traffic stop. There was no indication either way that the Defendant's speed was either excessive or unusually slow under the circumstances.

Florida law of course recognizes that a police officer may conduct a traffic stop to investigate a driver for weaving within a lane of travel; but, most often the weaving is continuous and/or coupled with other erratic and unsafe driving behavior. *See e.g. State v. Davidson*, 744 So.2d 1180 (Fla. 2d DCA 1999) (reversing order granting motion to suppress where officer observed driver traveling 40-50 m.p.h. on I-75 and continually driving across the line and jerking back in opposite direction in corrective manner); *Roberts v. State*, 732 So.2d 1127 (Fla. 4th DCA

1999) (upholding traffic stop where driver observed continually weaving right and left within the lane several times); *State v. Carillo*, 506 So.2d 495, 496 (Fla. 5th DCA 1987) (quashing order of suppression where officer observed driver moving from extreme right-hand side of road to extreme left-hand side of lane in excess of five times over quarter mile); *Esteen v. State*, 503 So.2d 356, 357 (Fla. 5th DCA 1987) (affirming denial of motion to suppress where driver traveling 45 m.p.h. on I-95 and "driving in erratic fashion…weaving within the right lane…executing an S shape up the Interstate" over the course of a half mile.); *Cf. Crooks v. State*, 710 So.2d 1041, 1042 (Fla. 2d DCA 1998) (reversing trial court's denial of motion to suppress where officer observed driver drift over right-hand lane line three times and officer did not think driver was intoxicated or otherwise impaired).

Unlike most of the cases cited above, Defendant here was observed weaving one time within his lane of travel while negotiating a curve. There was no continuous weaving back and forth as in *Davidson*, *Roberts*, and *Carillo*. There was no crossing from one extreme side of the road to the other as in *Carillo*. There was no driving significantly under the speed limit as in *Davidson* and *Esteen*. The additional observations of leaving a turn signal on an "unusual" amount of time and "irregularly" toggling cargo lights are not, in this court's opinion, sufficient to create a founded suspicion of criminal activity, even when coupled with the limited weaving. Even Deputy Maletto very candidly agreed that nothing about the Defendant's driving pattern was erratic, dangerous, or unsafe.

Under these circumstances, the court concludes that Deputy Maletto did not have a reasonable suspicion of criminal activity at the time he initiated the traffic stop of the Defendant's vehicle.

WHEREFORE, it is ORDERED as follows:

1. The Defendant's Motion to Suppress is GRANTED.
2. All evidence of the Defendant's detention and arrest, including his identity and any evidence flowing from the arrest, are hereby suppressed and shall not be used against the Defendant in any further proceedings in this matter.

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

7/29/2022 12:08 PM 2021 105460 MMDL

e-Signed 7/29/2022 12:08 PM 2021 105460 MMDL

A.Christian Miller
County Court Judge

Copies to:
Elba Roman-Pacheco, Esq.
Aaron Delgado, Esq.

IN THE COUNTY COURT FOR VOLUSIA COUNTY, FLORIDA

JASMINE REYES, **Plaintiff,**	**CASE NO.:**	**2020 16482 CODL**
v.	**DIVISION:**	**73**
MOBILAONS LLC, MARSHALL PIERITE, KIM WALTON PALERMO, AND CHARLOTTE HOLMES, **Defendant(s).**		

_____ /

ORDER OF DISMISSAL

This matter is before the court on the *Defendants' Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration*. The court has reviewed Defendants' Motion, the various responses and replies of the parties, conducted a hearing on the matter, and considered the evidence, arguments and authorities presented by the parties. For the reasons expressed below, the court grants Defendants' Motion[1].

Defendants ask the court to dismiss this case based upon a claim of sovereign immunity, which if proven, would deprive the court of subject matter jurisdiction. Plaintiff responds that Defendant is not entitled to sovereign immunity because they are not an "arm of the [Tunica-Biloxi Indian] tribe." The court examines this claim and the Plaintiff's responses below.

Sovereign Immunity

"Under Florida law, it is well settled that the Indian tribes are independent sovereign governments that are not subject to the civil jurisdiction of the courts of this state." *Miccosukee Tribe of Indians v. Napoleoni*, 890 So. 2d 1152, 1153 (Fla. 1st DCA 2004). "As such, the Tribe and its agents are immune from suit in federal or state court without (1) a clear, explicit, and

[1] Due to the court's finding of sovereign immunity as to all Defendants, it does not reach the arbitration issues.

unmistakable waiver of tribal sovereign immunity, or (2) a congressional abrogation of that immunity." Id. Plaintiff does not argue waiver or congressional abrogation, but rather that Defendants are not entitled to the sovereign immunity as they are not an "arm of the tribe."

On this issue, the United States Supreme Court has noted,

> Lower courts have held that tribal immunity shields not only Indian tribes themselves, but also entities deemed "arms of the tribe." See, *e.g., Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort,* 629 F.3d 1173, 1191–1195 (C.A.10 2010) (casino and economic development authority were arms of the Tribe); *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.,* 585 F.3d 917, 921 (C.A.6 2009) (tribal conglomerate was an arm of the Tribe). In addition, tribal immunity has been interpreted to cover tribal employees and officials acting within the scope of their employment. See, *e.g., Cook v. AVI Casino Enterprises, Inc.,* 548 F.3d 718, 726–727 (C.A.9 2008); *Native American Distributing v. Seneca–Cayuga Tobacco Co.,* 546 F.3d 1288, 1296 (C.A.10 2008); *Chayoon v. Chao,* 355 F.3d 141, 143 (C.A.2 2004) (*per curiam*); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.,* 177 F.3d 1212, 1225–1226 (C.A.11 1999).

Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 825 (2014)

In determining whether an entity is an "arm of the tribe," many courts will apply the factors used in the *Breakthrough* case*,* namely: (1) the method of the entity's creation; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the Tribe has over the entity; (4) whether the Tribe intended for it to have tribal sovereign immunity; (5) the financial relationship between the Tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting it immunity. *Breakthrough*, 629 F.3d at 1191.

1. The Method of Mobiloans' Creation

Mobiloans is chartered as a Limited Liability Company pursuant to Tunica-Biloxi Tribal law. Decl. Pierite ¶ 6, Sept. 14, 2020. It was created by the Tribal Council of the Tunica-Biloxi Tribe of Louisiana pursuant to Tribal Council Resolution 24-11 as "an arm of the Tribe for business

purposes, in the form of a limited liability company of which the Tribe is the sole Member." *Id.* at Ex. 2.

Plaintiff submitted cases discussing Mobiloans' historical affiliation with other non-Tribal entities and its creation, but no admissible evidence[2] that contradicted Defendants' affidavits regarding its creation. The court finds this factor weighs in favor of immunity.

2. The Purpose of Mobiloans

Mobiloans was created to generate and contribute revenues to the Tunica-Biloxi Indian Tribe's general fund, which are then used for the "economic development and benefit of the Tribe." Decl. Pierite ¶ 8, Sept. 14, 2020. More specifically, Mobiloans' purpose is to "engage in lending and related activities that will generate additional revenues for the Tribe." *Id. at* ¶ 9. The revenues are used to fund schools, social services and Tribal government. *Id.* Examples of programs funded by revenues generated by Mobiloans are a "Juvenile Teen Court Program, the Avoyelles Parish School Board, the Avoyelles Parish Justice Center, and the Avoyelles Court Appointed Special Advocates ("CASA") program." *Id.* The funds are even used to assist Tribal citizens with relief from Hurricane Laura, COVID-19 and to provide "housing, healthcare, and basic services to Tribal citizens." *Id.*

Again, Plaintiff submitted various caselaw and other filings discussing Mobiloans' alleged true purposes – profit generation for non-Tribal entities. Some of the Plaintiff's filings contain very thorough, detailed information. *See, e.g.,* Pltf's Notice of Filing, Dec. 1, 2021, *Stmt. Undisputed Facts, Commw. of Pa v. Think Finance, Inc. et al.*, and *Hengle et al., v. Treppa et al.*,

[2] In *Seminole Tribe of Florida v. McCor*, the Second District Court of Appeal held that a trial court could properly consider *affidavits* in ruling upon a motion to dismiss for lack of subject matter jurisdiction. 903 So.2d 353, 357 (Fla. 2d DCA 2005). *See also*, section 2, *infra*.

20-1062 (4th Cir. Nov. 16, 2021). Neither party asked the court to take judicial notice of these documents. However, even had such a request been made, they are not admissible as *evidence*. *See Rubrecht v. Cone Distributing, Inc.*, 95 So.3d 950, 959 (Fla. 5th DCA 2012) (holding "a statement of fact made in an appellate opinion[3] in one case cannot substitute for the presentation of evidence in another case.")

Plaintiff's primary evidentiary basis for these allegations are Mobiloans' discovery responses indicating it paid relatively small percentages of its gross revenues to the Tunica-Biloxi Tribe from 2018 until 2020. *See Def. Obj. and Resp. Pltf's First Set Interrog.* [4], ¶ 8, Mar. 29, 2021. However, similarly to the discussion in section 5 below, the court does not possess any factual context surrounding these percentages that could make them more meaningful. Unlike in *Solomon*, Plaintiff here has presented no evidence proving that large sums of revenue from Mobiloans' revenues were distributed to non-Tribal entities. *Solomon*, 375 F. Supp. 3d at 654 (recounting testimony of the disparate distribution of $110 million to a non-Tribal entity compared to $8 million received by the Tribe). Accordingly, this factor weighs in favor of immunity.

3. Structure, Ownership, And Management, Including the Amount of Control the Tribe Has Over Mobiloans

a. Mobiloans' Structure

The Tunica-Biloxi Tribe created Mobiloans as a limited liability company. *Charter of Mobiloans*, Art. II. It is also operated by the Tribe. Decl. Pierite ¶ 6, Sept. 14, 2020. The affairs of the company are overseen by a four-person Board of Managers, all of which must be enrolled

[3] This court sees no meaningful distinction between statements of fact in an appellate opinion and those made in trial court opinions or the filings by parties in unrelated cases. None are admissible as evidence in a separate case.

[4] Apparently, Plaintiff sent two sets of interrogatories to Defendant Mobiloans labeled as "first." For clarity, the court will refer to the two responses by their date of execution.

members of the Tribe, and two of which must be sitting members of the Tribal Council. *Second Amend. Restated LLC Oper. Agmt. Mobiloans, LLC*, Art. III, s. 3.2.

Mobiloans operates out of its sole office located on the Tribe's reservation in Marksville, Louisiana. Decl. Pierite ¶ 14, Sept. 14, 2020. Tribal citizens work for Mobiloans, such as Richelle Malveaux who acts as a Communications Liaison between the company and the Tribal Chairman and Tribal Council. *Id. at* ¶¶ 12, 13. Defendant Charlotte Holmes is another Tribal citizen that works for Mobiloans as its Administration Manager. *Id. at* 13.

Plaintiff argues this sub-factor should weigh against immunity for four reasons: (1) the risk of loss is not borne by the Tribe, (2) it obtains funding for the loans from a non-Tribal source, (3) Defendant's server is located off reservation, and (4) the day-to-day operations are largely delegated to outside third-party contractors. The court will address each argument in sequence below.

i. Risk of loss

The risk of loss argument is discussed in more detail in section 5 below, as the court finds that section (financial relationship with the Tribe) is more appropriate for this argument.

ii. Outside funding

Plaintiff cites Defendant's interrogatory answer admitting it receives capital funding from the Circle of Nations. Accordingly, Plaintiff contends the Circle of Nations is the entity that actually "bears the brunt of the risk" if the loans fail. *See Pltf's Supp. Resp.*, pg. 11, Dec. 11, 2021. As this is an offshoot of "risk of loss" argument, the court's analysis from section 5 applies here as well. More importantly, Plaintiff has failed to present any evidence demonstrating which party

agreed to bear the risk of loss in their financial relationship. It may be the case that Mobiloans guaranteed to pay back the Circle of Nations any funding it provided, regardless of whether the loans generated by Mobiloans were repaid by the consumers. Alternatively, it could be just as Plaintiff assumes that some entity other than Mobiloans assumed that obligation, possibly including Circle of Nations. The obvious point here is that unlike the Plaintiff, the court is not at liberty to speculate on these issues.

iii. Server location

Exhibit B to Plaintiff's Complaint appears to be a screenshot showing Defendant Mobiloans' website "mobiloans.com" is hosted on a server located in San Jose, California, many thousands of miles away from the Tribe's reservation in Louisiana. Plaintiff argues this is evidence that Mobiloans' day-to-day business is run by non-Tribal members. Beyond any questions of authentication and accuracy, the court fails to appreciate the probative value of a website's server's location and what that shows about the employees running the business. Moreover, important contextual information is lacking. For example, is this a shared or dedicated IP address? Was a proxy server or a virtual private network (VPN) used? Both tools are commonly used by companies and individuals to protect their IP addresses for cybersecurity reasons. *See* https://www.kaspersky.com/resource-center/definitions/what-is-an-ip-address (last accessed on April 4, 2022). Ultimately, even if the server for Mobiloans' website were in California, this is not mutually exclusive with the evidence presented by the Defendant that it has a number[5] of Tribal citizens working as employees at its office on the Tribal reservation. Furthermore, it is also possible that the server hosting Mobiloans' website is different from the server utilized for

[5] Plaintiff also cites the Clarity inspection report describing *only* 10 employees working at Mobiloans' office. Again, without context, this figure lacks any probative value for or against immunity. Moreover, Defendant's interrogatory responses indicate Mobiloans employed or contracted with over 61 individuals to process its lines of credit from January 1, 2017, to present. *See Def. Obj. and Resp. Pltf's First Set Interrog.* ¶ 2, July 29, 2021.

processing of loan applications and other business functions. In fact, in a site inspection report prepared by third party vendor Clarity Services, Inc., it noted that a server was observed in a locked closet next to the call center within Mobiloans' office on the reservation. *See Docket No. 59*, Bates Stamp 88, 89.

iv. Third party contractors

On this point, Plaintiff argues that Defendant further outsources much of the day-to-day operational activity to third party contractors. In support, she submitted a series of confidential Agency Addendum agreements and Defendant's discovery responses. The series of Agency Addendum agreements show Mobiloans entered service contracts with Cortex Sovereign, LLC[6], MaxDecisions[7], and TC Decision Sciences, LLC[8] to provide "credit information processing services" based upon proprietary credit information provided to them by Clarity. *See Docket No. 59*.

Although it appears Mobiloans does contract with third parties for certain "credit information processing services," no evidence has been presented establishing what exactly those services entail, and more importantly, the role those services play in Mobiloans' overall business model. For example, if the "credit information processing services" is merely the furnishing of credit scores and credit reports to Tribal citizen/employees, and then those Tribal citizen/employees are responsible for the rest of the loan processing workload, that would severely weaken Plaintiff's claim that most daily operations are performed by non-Tribal entities. However, if the "credit information processing services" also includes generating loan

[6] Delaware LLC based in Irving, Texas

[7] Delaware corporation based in Plano, Texas

[8] Texas LLC based in Fort Worth, Texas

applications, processing the applications, and making lending decisions, that would be significantly more probative of Plaintiff's claim. Again, the court cannot speculate, it must base its decision on the evidence (or lack thereof) presented.

b. Mobiloans' Ownership

"Mobiloans is wholly owned and operated by the Tribe." Decl. Pierite ¶ 6, Sept. 14, 2020. The Tribe "retains control over the company's activities." *Id. at* ¶ 8. In fact, the Tunica-Biloxi Fairness in Lending Code requires that Tribal lending entities be owned by the Tribe. *Id.* at ¶ 16.

Plaintiff has presented no probative evidence to the contrary.

c. Mobiloans' Management

It also appears that the Tribe is heavily involved in Mobiloans' business affairs. For example, Mobiloans is required to obtain the Tribal Council's approval for its budget, business plan, appointment of an executive director, the sale or transfer of any asset, waiver of its immunity, the commitment or burden of any tribal resource, any amendment to its Charter or Operating Agreement, and to participate in any other business. *Id. at* ¶ 10. Mobiloans also provides monthly financial reports and meets quarterly with the Tribal Council. *Id. at* ¶ 11. It also meets at least once per year with the general Tribal citizenship. *Id.* As previously noted, Tribal citizens Richelle Malveaux and Defendant Charlotte Holmes are employed in executive level positions with Mobiloans. *Id. at* ¶¶ 12-13.

Except as discussed in section 3(a) above, Plaintiff did not present any direct evidence refuting Defendant's affidavits regarding the management of Mobiloans' by the Tribe. The court finds this factor weighs in favor of sovereign immunity.

d. Amount of Control Tribe Has over Mobiloans

The preceding discussion of Mobiloans' management is also indicative of the amount of control the Tribe has over Mobiloans. In addition, "The Tribal Council has the right to remove and appoint members of [Mobiloans'] Board." *Id. at* ¶ 10. Moreover, the Tribe's previously mentioned Lending Code is a regulatory scheme that applies to lending companies such as Mobiloans. The Lending Code established a regulatory commission "charged with licensing each lending operation and loan product, engaging in rolling regulatory compliance examinations of each lending operation, and conducting background investigations of each key employee or officer, among other things." *Id. at* ¶ 15. Thus, it appears from the evidence before the court that the Tribe retains a high degree of control over Mobiloans' operation.

Except as discussed in section 3(a) above, Plaintiff did not present any direct evidence refuting Defendant's affidavits regarding the amount of control the Tribe exercises over Mobiloans. The court finds this factor weighs in favor of sovereign immunity.

4. Whether the Tribe Intended for Mobiloans to Have Tribal Sovereign Immunity

The Tribe "explicitly vested Mobiloans with all of the 'privileges and immunities' of the Tribe itself, including its immunity from suit, from taxation, and from regulation." Decl. Pierite ¶ 7, Sept. 14, 2020. Defendant's Charter and Operating Agreement similarly reflect this intention. *Id. at* Ex. 1 (Charter of Mobiloans, LLC, Art. X Privileges and Immunities providing, "The LLC shall be vested with all of the privileges and immunities of the Tribe, including, without limitation, the immunity from suit by any person or entity in any forum…") *and* Ex. 2 (Second Amendment and Restated Limited Liability Company Operating Agreement of Mobiloans, LLC, Art. VI, s. 6.1 Status of Tribal Entity providing, "As an arm of the Tribe, an entity wholly-owned by the Tribe

and as a Tribally-chartered entity, the Company is clothed by tribal and federal law with all the privileges and immunities of the Tribe, except as may be specifically limited by the Charter, including sovereign immunity of the Company from suit, consent to suit, or consent of the Company or the Tribe, to the jurisdiction of the United States or of any state with regard to the business or affairs of the Company or to any cause of action, case or controversy, except as provided herein."). The originating documents for Defendant Mobiloans explicitly indicate the Tribe intended for Mobiloans to have the benefits of its tribal sovereign immunity.

Plaintiff again cites Mobiloans' answers to interrogatories to argue that the true purpose of Mobiloans is to generate revenue for non-Tribal entities. *See Pltf's Suppl. Resp.* pg. 11-12. As a result, Plaintiff contends, Defendants' true intent is to extend its sovereign immunity to non-Tribal entities in order to shield their illegal activities, and Defendants can have no legitimate interest in doing so. Id. Plaintiff cites for support the holding and analysis of the court in *Solomon v. Am. Web Loan*, 375 F.Supp. 3d 638 (E.D. Va. 2019). However, as stated above, this court cannot use the factual findings and other statements in another court's opinion as evidence in the case at bar. *See Rubrecht*, *supra*.

The court finds that this factor weighs in favor of immunity.

5. The Financial Relationship between the Tribe and Mobiloans

According to Defendant's affidavits, Defendant Mobiloans is "one of the business enterprises that helps fund the Tribe and its government." Decl. Pierite ¶ 6, Sept. 14, 2020. "[Mobiloans] provides for the economic development and benefit of the Tribe." *Id. at* ¶ 8. Defendant Mobiloans has contributed more than $23.5 million to the Tribe since its creation in 2011. *Id. at* ¶ 9. "These revenues flow only to the Tribe," the affidavit continues, "and have been

used to fund Tribal educational and social services, as well as general government expenses." Id. The various Tribal programs and services supported by the revenue have been described above. *Supra*, section 2. It is further alleged that "If the revenue stream generated by Mobiloans' business operations was lost or reduced, that would have a direct and negative effect on the Tribe's ability to provide such services." *Id. at* ¶ 17.

Plaintiff does not dispute much of the Defendant's evidence on this point. However, Plaintiff's evidence (the answers to interrogatories) focuses on the money she alleges is flowing from Mobiloans to other, non-Tribal entities. For example, in Defendant Mobiloans' interrogatory responses, it indicated its gross revenues for the years 2018 through 2020 were $65,857,272 (2018), $64,082,028 (2019), and $56,968,046 (2020). *See Def. Obj. and Resp. Pltf's First Set Interrog.* ¶ 5, Mar. 29, 2021. Yet the same discovery responses indicate that Defendant Mobiloans paid only 2% (2018), 4% (2019), and 7% (2020) of its gross revenues to the Tribe in the respective years.

Plaintiff invites the court to conclude that Defendants' discovery responses prove most of Defendants' revenues are distributed to non-Tribal entities. One such entity that many of Plaintiff's materials reference is Think Finance, LLC. Defendants admit they previously contracted with Think Finance, LLC to "assist[] the Tribe in administering MobiLoans' loans because the Tribe lacked the relevant experience in the financial services industry." Decl. Pierite ¶ 3, Jan. 25, 2022. However, Defendant Mobiloans ended its relationship with Think Finance after restructuring in 2017. *Id.* Defendant Mobiloans' discovery response further indicates that no money from its general revenue has been paid to Think Finance since before 2018. *See Def. Obj. and Resp. Pltf's First Set Interrog.* ¶ 9, Mar. 29, 2021.

As previously stated in section 2 above, the court is missing some vital context to determine the full impact of the financial data. For example, what were Defendant Mobiloans' operating expenses for the years 2017-2020? What were its net profits? What are the typical operating expenses and net profit ratios of similar businesses? Answers to these questions would be very helpful for determining the probative value of the percentages Plaintiff claims as proof of Defendants' financial relationships with third parties. Without this contextual information, the court must make assumptions that large sums of money are being sent to non-Tribal entities. Obviously, the court cannot base its conclusions on unproven assumptions.

Plaintiff also argues that any potential judgments entered against Defendants would not effect the Tribe based upon the terms of its Operating Agreement with the Tribe. For example, in Article VI, Section 6.4, the Agreement states,

> Credit of the Tribe and Assets of the Company. Nothing in the Charter of this Agreement, nor any activity of the Company, shall implicate or in any way involve the credit of the Tribe. The Company shall have only those assets formally assigned to it by the Tribal Council, together with those assets it may acquire or generate from other sources and business activities. **No activity of the Company nor any indebtedness incurred by it shall implicate or in any way involve any assets of the Tribe not expressly assigned to the Company in writing.**

(emphasis added) The above language tends to support Plaintiff's argument that Mobiloans is separated from the Tribe because no judgment against Mobiloans will actually effect the Tribe's assets.

Although the evidence on this factor is mixed, the court finds this factor weighs against immunity primarily due to the Tribe's lack of actual financial exposure to any adverse judgments or other financial obligations incurred by Mobiloans.

6. Whether the Purposes of Tribal Sovereign Immunity Are Served by Granting Mobiloans Immunity

To determine this factor, the court must first recognize the purposes served by tribal sovereign immunity. Several state and federal decisions have provided the answers in various contexts. For example, in *California v. Cabazon Band of Mission Indians*, the Supreme Court recognized the involved Tribes lacked natural resources that could be exploited. 480 U.S. 202, 218 (1987) *superseded by statute,* Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C)*, as recognized in Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014). As a result, Tribal gaming provided the "sole source of revenues for the operation of the tribal governments and the provision of tribal services." Id. at 218-19. The Court further noted that the Tribal gaming enterprises were major employers on the reservations. Id. at 219. Prohibiting application of California's regulatory scheme thus furthered the Tribes' interests in self-determination and economic development, the Court found. *Id.*

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Supreme Court addressed whether Oklahoma could tax the sale of cigarettes on Tribal reservation land. 498 U.S. 505 (1991). In appellate arguments, Oklahoma advocated the Court to abandon the doctrine of tribal sovereign immunity entirely. *Id. at* 510. In the Court's response below, it highlighted the underlying goals of sovereign immunity,

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. *Turner v. United States,* 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *Santa Clara Pueblo v. Martinez, supra,* 436 U.S., at 58, 98 S.Ct., at 1677. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine. See, *e.g.,* Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.,* and the Indian Self–

> Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.* **These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."** *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216, 107 S.Ct. 1083, 1092, 94 L.Ed.2d 244 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Id. (emphasis added). *See also*, *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1111 (Ariz. 1989) (recognizing additional federal policies behind the tribal sovereign immunity doctrine including "Protection of tribal assets, preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians.") Next the court must consider whether application of sovereign immunity to Defendants will further these purposes.

Mobiloans is a business. Like almost every other business, it exists to make money. Mobiloans' stated purpose is to generate revenues, portions of which it then gives to the Tunica-Biloxi Indian Tribe to help fund various educational, governmental and societal needs within the Tribal population. Finding that Defendants are not immune from suit would potentially place the assets of Mobiloans at risk, thus impacting its ability to give of its revenues to support the needs of the Tribe. This would defeat the intended purposes of "encouraging tribal self-sufficiency and economic development." *Oklahoma Tax Comm.*, 498 U.S. at 510.

Even though the court found in section 5 that the evidence concerning Mobiloans' financial relationship with the Tribe weighed *against* a finding of immunity, this is not dispositive of the issue. That is only one of the six factors the court considered in resolving this question. Based upon the totality of the evidence presented, the court finds that Mobiloans is an arm of the Tunica-

Biloxi Indian Tribe. Therefore, it is entitled to share in the Tribe's sovereign immunity, and this court lacks subject matter jurisdiction to hear the Plaintiff's claims against it.

Defendants Pierite, Palermo, and Holmes

Plaintiff argues Defendants Pierite, Palermo and Holmes are not entitled to sovereign immunity because Plaintiff sues them in their individual capacities. However, language in Plaintiff's Complaint is fatal to this argument. For example, in paragraphs 140 through 143 of the Complaint, Plaintiff alleges as follows:

> 140. Pierite, Palermo and Holmes are employed by, and/or associated with MobiLoans.
>
> 141. Pierite, Palermo and Holmes directly participated in MobiLoans' collection of the unlawful debt.
>
> 142. Pierite, Palermo and Holmes also participated *indirectly* in MobiLoans' collection of the unlawful debt, though their roles as Chairman of the Tribe, Chief Compliance Officer, and Loan Administration Manager, respectively.
>
> 143. On information and belief, Pierite, Palermo and Holmes each received proceeds derived directly from MobiLoans' collection of usurious loans, including Ms. Reyes'.

Furthermore, in Count III of her Complaint (the only Count alleged against these Defendants), Plaintiff alleges as follows:

> **COUNT III**
> **VIOLATIONS OF THE CRCPA — PIERITE, PALERMO, HOLMES**
>
> 156. Ms. Reyes incorporates paragraphs 1 – 144 as if fully stated herein.
>
> 157. Pierite, Palermo and Holmes violated **Section 772.103(3), Florida Statutes**, in that they knowingly participated, both directly and indirectly, in MobiLoans' collection of an unlawful debt from Ms. Reyes and received proceeds therefrom.
>
> 158. At all times relevant, Pierite, Palermo and Holmes were employed by or associated with MobiLoans.
>
> 159. The conduct of Pierite, Palermo and Holmes renders them jointly and severally liable with MobiLoans for the above-stated violations of Section 772.103, Florida Statutes.
>
> **WHEREFORE,** Ms. Reyes respectfully requests this Honorable Court enter judgment against Pierite, Palermo and Holmes, jointly and severally, ordering:
>
> a. Threefold the amount of actual damages of at least $7,700 (for a total of **$23,100**), or, in the alternate, the statutory minimum of $200, pursuant to Section 772.104(1), Florida Statutes.

Based upon these allegations, it is clear to the court that Plaintiff alleges these Defendants committed certain wrongs while acting as employees and officers of Mobiloans, rather than in their individual capacities. Therefore, the real party in interest is Mobiloans, rather than these individually named Defendants. *See Lewis v. Clarke*, 137 S.Ct. 1285, 1294 (2017). Defendants Pierite, Palermo and Holmes are therefore entitled to sovereign immunity as well.

Wherefore, it is ORDERED AND ADJUDGED, the Defendants' Motion to Dismiss is hereby GRANTED. This matter is hereby DISMISSED with prejudice.

DONE AND ORDERED in Chambers in Deland, Volusia County, Florida.

4/11/2022 1:36 PM 2020 16482 CODL

e-Signed 4/11/2022 1:36 PM 2020 16482 CODL {}

A. CHRISTIAN MILLER
COUNTY JUDGE

Copies to:
Bryan J. Geiger, Esq.
Michael J. Furbush, Esq.

Tab 27
Reversals

MANDATE

From

CIRCUIT COURT OF APPEAL OF VOLUSIA COUNTY, FLORIDA

SEVENTH JUDICIAL CIRCUIT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION; REVERSED in part; AFFIRMED in part and REMANDED YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS BE HAD IN SAID CAUSE IN ACCORDANCE WITH THE OPINION OF THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE JUDGE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA AND THE SEAL OF SAID COURT AT DELAND, FLORIDA ON THIS 11 March 2020.

LAURA E. ROTH
CLERK OF THE CIRCUIT COURT
By: Heather Brooke
Heather Brooke
Deputy Clerk

FILED
2020 MAR 11 AM 9:49
CLERK OF THE CIRCUIT & CTY. COURT VOLUSIA CTY., FL
CC 48

Style: Alexis Mooney v Jill Dempsey
Appeal Docket No.: 2019-10012-APCC
Lower Case No. : 2018-17648-CODL
c: Abraham McKinnon, Esq, Kenneth Bohannon, Esquire, Honorable James Clayton and Lower Court File

CL-0147-1701

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

ALEXIS MOONEY,
Appellant,

v.

JILL DEMPSEY,

Appellee.

CASE NO.: 2019-10012 APCC
LOWER CASE NO: 2018-17648 CODL

Tenant appeals Judgement of the lower court as it relates to interpretation of a commercial lease. The court finds that the trial judge erred in making a finding that the lease was in breach status at the time of execution. The court reviewed this case on the de novo standard.

Parties' executed a first lease involving a non-entity (Flagler Pines LLC). Subsequent to that, the parties executed a second lease with an effective date of September 1, 2018 but an execution date of November 14, 2018.

The trial court held: (1) That the first lease was invalid, (2) That the second lease was a valid lease, and (3) That the tenant was in breach of the second lease at the time of execution of the lease because she had failed to obtain written notice from the landlord to make modifications of the premises (which were done before the second lease was signed.)

The trial court erred in finding that the November 14, 2018, lease equitably reformed the prior lease of August 1, 2018. The evidence and testimony at trial revealed that both parties mutually agreed that the November 14, 2018 lease replaced and superseded any prior leases and/or agreement between the parties. Therefore, the lower

court is reversed in part and affirmed in part. Tennant, Alexis Mooney, is not in breach of the lease executed November 14, 2018. The remaining portion of the final judgment is affirmed. This matter is remanded to the lower court for determination of entitlement and amount of attorney's fees to be awarded to the Appellant, Alexis Mooney, as prevailing party.

DONE AND ORDERED in Volusia County, DeLand, Florida this 10th day of January, 2020.

MANDATE

From

CIRCUIT COURT OF APPEAL OF VOLUSIA COUNTY, FLORIDA

SEVENTH JUDICIAL CIRCUIT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION; REVERSED; REMANDED

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS BE HAD IN SAID CAUSE IN ACCORDANCE WITH THE OPINION OF THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE JUDGE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA AND THE SEAL OF SAID COURT AT DELAND, FLORIDA ON THIS 8 June 2020.

LAURA E. ROTH
CLERK OF THE CIRCUIT COURT

By: _____
F.Hardy
Deputy Clerk

FILED
2020 JUN -8 PM 4:08
CLERK OF THE CIRCUIT
& CTY. COURT VOLUSIA CTY. FL
CC 48

Style: GEICO General Insurance Company vs Lake Mary Chiropractic Center P A, a/a/o Charles Grayson
Appeal Docket No.: 2018-10048 APCC
Lower Case No. : 2017-23045 CONS

CL-0147-1701

c: Douglas Stein, Esq., Kimberly P. Simoes, Esq., Michael A. Rosenberg, Esq., Lower Court

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

APPELLATE DIVISION

GEICO GENERAL INSURANCE COMPANY,

Appellant,

v.

LAKE MARY CHIROPRACTIC CENTER, P.A., a/a/o CHARLES GRAYSON,

Appellee.
_____/

CASE NO.: 2018 10048 APCC
L.T. CASE NO.: 2017 23045 CONS

Appeal from the County Court, Volusia County, Florida.

OPINION OF THE COURT UPON REMAND

This matter came before this Court in its appellate capacity for review of an Order Awarding Final Judgment in Favor of Plaintiff rendered July 26, 2019 and upon remand from the Fifth District Court of Appeal in the consolidated petition for writ of certiorari in *GEICO Indemnity Co. v. Accident & Injury Clinic (a/a/o Frank Irizarry)*, quashing this Court's August 5, 2019 Amended Opinion.

The Court's March 24, 2020 Order Granting Geico's Motion to Stay Appeal is hereby VACATED.

The Court has considered the motions and responses filed by the parties upon remand, and hereby REVERSES and REMANDS the lower court's Order and Final Judgment pursuant to the mandate from the Fifth District Court of Appeal. The lower court is hereby instructed to enter a judgment in favor of GEICO consistent with the decision of the Fifth District Court of Appeal.

Furthermore, Appellee's motions for appellate attorney's fees are hereby DENIED.

DONE AND ORDERED in Volusia County, Florida this 19th day of May, 2020.

STEVEN C. HENDERSON
CIRCUIT JUDGE

KATHERYN D. WESTON
CIRCUIT JUDGE

Copies by electronic delivery:
Douglas H. Stein, Esq.
Kimberly P. Simoes, Esq.
Michael A. Rosenberg, Esq.
Volusia County Court Judge A. Christian Miller

Tab 28
Significant Opinions on Constitutional Law Issues

IN THE COUNTY COURT FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff(s), **CASE NO.: 2022 101532 MMDL**

vs.

BRANDON W. BLEKICKI,

Defendants(s).

_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO SUPPRESS

This matter came before the Court to be heard on the Defendant's Motion to Suppress. The Court reviewed the Motion, conducted an evidentiary hearing, and considered the arguments presented by the parties. Based upon the foregoing, the Court finds as follows:

Findings of Fact

Shortly before 3 am on April 8, 2022, Mr. Blekicki was driving north on U.S. Highway 17/92 in his white Chevrolet pickup truck. Deputy John Lowery of the Volusia County Sheriff's Office observed Mr. Blekicki's truck and noticed the license plate was not clearly visible. However, before Deputy Lowery could conduct a traffic stop for the violation, Mr. Blekicki pulled off the highway and parked his truck in the Publix parking lot at the corner of 17/92 and Orange Camp Road. Believing this to be an attempt to avoid contact with police, Deputy Lowery followed Mr. Blekicki into the lot and began his traffic stop.

Once he approached, Deputy Lowery observed Mr. Blekicki to have a strong odor of alcohol coming from his person and his breath, as well as red, bloodshot eyes. Deputy Lowery believed Mr. Blekicki was holding onto his truck for stability, however the body camera video evidence tends to contradict this interpretation[1]. Deputy Lowery also observed very occasional

slurred speech. Mr. Blekicki was visibly irritated with Deputy Lowery and denied drinking any alcohol. Mr. Blekicki denied pulling into the parking lot to avoid Deputy Lowery, and he claimed he pulled in to check his oil. Mr. Blekicki initially claimed to be heading home, which if true, would mean he was traveling in the wrong direction[2].

After routine checks for warrants, Deputy Lowery began a DUI investigation by performing a shortened horizontal gaze nystagmus (HGN) exercise, during which he observed some indicators of impairment. Deputy Lowery then confronted Mr. Blekicki about his suspicions that he had in fact consumed alcohol, which Mr. Blekicki continued to deny. When asked again where he was heading, Mr. Blekicki changed his answer and said he was headed to his brother's house in the Daytona Park Estates.

Deputy Lowery then asked Mr. Blekicki if there were any open containers of alcohol in the car or any guns. Mr. Blekicki said there was only BB guns, and he never directly answered the question about alcohol. Mr. Blekicki appeared to be quite uncomfortable and evasive during this exchange on the body camera video. Deputy Lowery asked Mr. Blekicki a second time if there was any alcohol in the vehicle, and when Mr. Blekicki was again evasive, Deputy Lowery stated "because I'm going to go look." Mr. Blekicki simultaneously stated, "you can ask her," referring to the female passenger in the truck.

Deputy Lowery then approached the driver's side door of the truck, opened the door[3] and began speaking with the female passenger. A Busch beer can is clearly visible in the center

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[1] It is also noted that Mr. Blekicki wears a prosthetic left leg. The video shows Mr. Blekicki standing just fine without support for a few moments before the Deputy's initial approach and again while the Deputy is running warrant checks in his patrol car.

[2] Mr. Blekicki's address is listed in Orange City, Florida, which is in the opposite direction of his travel.

[3] The truck is equipped with an aftermarket suspension system that raises the overall height of the truck. The lift, combined with what appeared to be darkened windows, would have made it difficult for Deputy Lowery to see

console, and Deputy Lowery refers to another silver or white colored can in the same area as alcoholic. When asked, the passenger stated she did not know who the cans belonged to but denied they belonged to herself or Mr. Blekicki. Deputy Lowery testified that he could see condensation on the Busch beer can, indicating its recency of usage. Deputy Lowery performed a brief visual inspection of the driver's area and just behind the driver's seat before returning to Mr. Blekicki.

Upon returning, Deputy Lowery confronted Mr. Blekicki about the open containers, which elicited additional protestations of ignorance and innocence. Deputy Lowery then asked Mr. Blekicki if he would perform additional, modified FSE's (due to his prosthetic leg), which resulted in more argument and equivocation by Mr. Blekicki. During his request for FSE's, Deputy Lowery stated, "you know under Florida law, it can't be used against you. And then were going to offer you to blow into a machine, and if you refuse that your license will be suspended automatically for the one year. Would you refuse that too?" Mr. Blekicki then gives an equivocal answer stating "I'm not trying to refuse…"

After a brief conversation with a backup officer, Deputy Lowery reapproached Mr. Blekicki and stated, "I have nothing to go on, Brandon. And it's your right to refuse field sobriety tests. If you refuse to do field sobriety tests, I have nothing to go on. I have no way to make a determination, only to go with the one thing that you did do, the [HGN], which told me that you are under the influence of a substance." Mr. Blekicki continued to argue with Deputy Lowery and refused to perform any additional FSE's.

Thereafter, Deputy Lowery read Mr. Blekicki the implied consent warning. After he refused to provide a breath sample, Deputy Lowery instructed Mr. Blekicki to walk to his patrol

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inside the truck and communicate with any passengers without opening the door.

car so he could be handcuffed and taken to jail. After further argument, Mr. Blekicki eventually complied and was transported to jail.

Conclusions of Law

1. Reasonable Suspicion of DUI

The first issue raised by Mr. Blekicki is whether Deputy Lowery had reasonable suspicion of DUI upon returning from his patrol car to continue Mr. Blekicki's detention and begin a DUI investigation. Mr. Blekicki cited numerous trial court and circuit appellate opinions in support of his argument. *See State v. Medina-Moya*, 8 Fla. L. Weekly Supp. 396c (Fla. Broward Cty. Ct. 2001) (odor of alcohol, bloodshot/watery eyes, admission to consuming alcohol insufficient for reasonable suspicion of DUI); *State v. Durant*, 22 Fla. L. Weekly Supp. 1095a (Fla. Hillsborough Cty. Ct. 2015) (odor of alcohol and glassy eyes insufficient for reasonable suspicion of DUI); *State v. Bertoni*, 13 Fla. L. Weekly Supp. 568b (Fla. 17th Cir. 2006) (odor of alcohol, red/watery eyes, flushed face insufficient for reasonable suspicion of DUI); *State v. Brantley*, 19 Fla. L. Weekly Supp. 373a (Fla. Volusia Cty. Ct. 2011) (odor of alcohol, slightly bloodshot eyes, speeding insufficient for reasonable suspicion of DUI); *State v. Gilstrap*, 18 Fla. L. Weekly Supp. 1176a (speeding, odor of alcohol, stumbling when exiting vehicle insufficient for reasonable suspicion of DUI); *State v. Stackhouse*, 20 Fla. L. Weekly Supp. 431a (Fla. Volusia Cty. Ct. 2012) (slight odor of alcohol coming from vehicle, dazed expression, red eyes insufficient for reasonable suspicion of DUI); *State v. Knuth*, 18 Fla. L. Weekly Supp. 470a (Fla. Volusia Cty. Ct. 2011) (odor of alcohol and admission to drinking insufficient for reasonable suspicion of DUI); *State v. Bithell*, 15 Fla. L. Weekly Supp. 137b (Fla. 17th Cir. 2007) (drifting into another lane, odor of alcohol, red eyes, admission to drinking insufficient for reasonable suspicion of DUI); *State v. Diprima*, Fla. L. Weekly Supp. 605b (Fla. Volusia Cty. Ct. 2014) (driving on median, faint odor of alcohol

coming from vehicle, admission to drinking insufficient for reasonable suspicion of DUI); *State v. Jacobs*, 22 Fla. L. Weekly Supp. 831a (Fla. Volusia Cty. Ct. 2014) (slightly slurred speech and slight odor of alcohol insufficient for reasonable suspicion of DUI).

However, the State cited *Origi v. State*, 912 So.2d 69 (Fla. 4th DCA 2005), and *State v. Ameqrane*, 39 So.3d 339 (Fla. 2d DCA 2010), which are binding[4] upon this Court. In *Origi*, the Court held that speeding, an odor of alcohol, and bloodshot eyes "gave rise to reasonable suspicion sufficient to justify detaining [a motorist] for a DUI investigation." *Id.* at 71-72. In *Ameqrane*, the Court likewise held that speeding, an odor of alcohol, and glassy/bloodshot eyes were sufficient to support a DUI investigation. *Id.* at 342.

In this Court's opinion, the facts in this case are more closely aligned with *Origi* than the cases cited by Mr. Blekicki. Here, Deputy Lowery observed an evasive driving pattern (attempting to avoid police contact), a *strong* odor of alcohol, red/bloodshot eyes, and an agitated motorist who was apparently confused (or misleading) about his direction of travel. This was more than enough, according to the Courts in *Origi* and *Ameqrane*, to justify further detention and investigation for DUI.

2. <u>The HGN Exercise</u>

Mr. Blekicki's second issue concerns the HGN exercise. It has three subparts. First, he argues that Deputy Lowery did not have reasonable suspicion to request that he submit to any field sobriety exercises at all. As the Court has already found to the contrary, it will not address this argument further. Second, Mr. Blekicki argues that Deputy Lowery improperly performed the

[4] *Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992) (holding "in the absence of interdistrict conflict, district court decisions bind all Florida trial courts.")

HGN exercise, and thus it should be suppressed. Third, he argues that Deputy Lowery performed the HGN exercise without his consent.

Regarding the administration of the HGN exercise, Mr. Blekicki submits that because Deputy Lowery performed a shortened version of the exercise with minimal instructions to Mr. Blekicki, the results should be suppressed, and Deputy Lowery should not be permitted to rely upon them in his formulation of probable cause for the later arrest. Mr. Blekicki cited *State v. Fitzgibbons* for support. 18 Fla. L. Weekly Supp. 541c (Fla. Pinellas Cty. Ct. 2010). In *Fitzgibbons*, the court held that improper administration of the HGN exercise should result in exclusion of the results. Unfortunately, the only analysis offered by the judge in *Fitzgibbons* was a deferential reference to the National Highway Traffic Safety Administration (NHTSA) manual, which purportedly states that "failure to follow the proper steps for administration compromises the validity of the exercise." *Id.* In this case, however, Deputy Lowery's unrebutted testimony at the hearing was that the NHTSA guidance on the administration of the HGN exercise is just that – guidance – as opposed to strict rules that must be followed in every case. Deputy Lowery stressed that each investigation is different, and thus each administration of the HGN exercise may be different based upon the conditions at the scene. The Court concludes that Mr. Blekicki's objection to the administration of the HGN exercise is more appropriately focused on the weight[5] the fact finder should accord the evidence, as opposed to its admissibility. *See Williams v. State*, 710 So.2d 24, 34 (Fla. 3d DCA 1998) ("Any discrepancies in the precise method used goes to the weight, rather than to the admissibility of such evidence.")

As to the second part of his argument (that Deputy Lowery should not be allowed to rely upon the HGN results in his formulation of probable cause), Mr. Blekicki fails to cite any legal

[5] By this conclusion, the Court is not dispensing with the State's obligation to lay a proper foundation for the evidence's admission at trial.

authority in support, other than *Fitzgibbons*, which did not address this specific issue. Nor can the Court find any authority on this issue. Further, it seems illogical to hold in one instance that a jury *can* consider this evidence (if admitted at trial), but that an officer investigating the crime in the field cannot. The Court concludes that Deputy Lowery was free to consider the results of his HGN exercise in formulating his opinion about probable cause for DUI.

The third argument regarding the HGN exercise is that because Mr. Blekicki did not consent to the exercises, the results (or rather evidence of the refusal) should be suppressed. However, as Judge Schumann recognized in *State v. Muse*, the police do not need a motorist's consent to perform field sobriety exercises when they have reasonable suspicion of DUI. 14 Fla. L. Weekly Supp. 890a (Fla. Volusia Cty. Ct. 2007). Physical cooperation may be required as a practical matter, but that is distinct from the legal concept of consent. *Id.*

3. Improper Search of the Truck

Mr. Blekicki further argues that Deputy Lowery violated his 4th Amendment rights by opening the door to his truck and performing a cursory visual inspection. As a preliminary matter, the text of the 4th Amendment itself is clear that it prohibits only "*unreasonable* searches and seizures…" U.S. Const. amend. IV (emphasis added). Therefore, the Court must examine the totality of the circumstances in deciding whether Deputy Lowery's actions were unreasonable.

At the time of the initial traffic stop, Deputy Lowery was the only police officer on scene. It was almost 3 a.m. and quite dark outside, the lighting in the parking lot notwithstanding. Mr. Blekicki evasively parked his truck to avoid contact with police. He was out of his truck quickly and closed the door behind him. He was visibly agitated with Deputy Lowery from the beginning of their encounter. There was an unsecured passenger in the truck, and the truck was raised to the

extent it would be almost impossible for Deputy Lowery (a man of average height) to see inside the truck without opening the door. Mr. Blekicki admitted to possessing a weapon[6] in the truck. As the video evidence revealed, Deputy Lowery's search lasted approximately 40 seconds. After opening the door, Deputy Lowery spoke with the passenger and visually inspected the driver's compartment and the area immediately behind the driver's seat. He did not remove anything from truck and closed the door after he finished.

In *Michigan v. Long*, the Supreme Court stated,

> "Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding the suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons."

463 U.S. 1032 (1983), citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Under these circumstances, the Court concludes that the cursory search of Mr. Blekicki's truck was not unreasonable, and it did not violate the 4th Amendment.

4. Premature Implied Consent Warnings

In this issue, Mr. Blekicki argues that because he was not under arrest when Deputy Lowery read him the implied consent warnings under Florida Statute 316.1932(1)(a)1.a., his refusal to provide a breath sample should be suppressed. The video evidence in this case clearly supports Mr. Blekicki's position, as he was placed under arrest only *after* he was read the implied consent warnings and refused to provide a breath sample. If the Court were writing on a blank slate, it

[6] The fact that the weapon was a BB gun does not diminish its potential dangerousness. BB guns can be deadly weapons depending on how they are used. *M.J. v. State*, 100 So.3d 1286 (Fla. 4th DCA 2012).

may be tempted to accept the State's interpretation of Florida Statute 316.1932 and find that the plain language only requires the actual testing be performed incident (after) to lawful arrest, and that the statute is silent as to when the implied consent warnings should be administered.

However, binding case law holds to the contrary. *See State v. Rivas-Marmol*, 679 So.2d 808 (Fla. 3d DCA 1996) (finding breath test administered before arrest was unlawful); *Valerio v. Dept. of Hwy. Safety & Motor Vehicles*, 15 Fla. L. Weekly Supp. 417a (Fla. 7th Cir. 2008) (lack of competent substantial evidence that refusal to provide breath sample was preceded by lawful arrest). Accordingly, Mr. Blekicki's refusal to provide a breath sample is inadmissible at his trial.

5. Lack of Probable Cause for DUI Arrest

Mr. Blekicki further argues that Deputy Lowery did not have probable cause to arrest him for DUI. Probable cause is defined as "a reasonable ground of suspicion supported by circumstances strong enough in themselves to warrant a cautious person in belief that the named suspect is guilty of the offense charged." *Johnson v. State*, 660 So.2d 648, 654 (Fla. 1995). When determining probable cause, courts must look at the totality of the circumstances.

In this case, Deputy Lowery observed Mr. Blekicki driving or in actual physical control of his white Chevrolet pickup truck. He saw Mr. Blekicki drive in an evasive manner attempting to avoid police contact. Mr. Blekicki provided a suspicious reason for pulling over. Deputy Lowery observed a strong odor of alcohol and found two fresh beer cans in Mr. Blekicki's truck. He observed red, bloodshot eyes on Mr. Blekicki as well as indicators of impairment during an abbreviated HGN exercise. Deputy Lowery observed Mr. Blekicki occasionally slurred his speech, and he appeared to be initially confused about his direction of travel. Furthermore, Mr.

Blekicki changed his answer about where he was traveling when Deputy Lowery asked again, and he became increasingly argumentative with Deputy Lowery. All of these observations combined could lead a reasonable, cautious person to believe Mr. Blekicki was driving under the influence and that his normal faculties were impaired. Accordingly, the Court finds Deputy Lowery had probable cause to arrest Mr. Blekicki for DUI.

6. Refusal to Submit to FSE's

In this final issue, Mr. Blekicki also claims that Deputy Lowery failed to advise him of any adverse consequences of refusing to submit to field sobriety exercises, and therefore his refusal is not admissible. As with issue four above, the video evidence supports Mr. Blekicki's position.

The State cited *State v. Taylor* in support of its position. 648 So.2d 701 (Fla. 1995). However, the fact that the defendant was not misled into believing his refusal was a "safe harbor free of adverse consequences" was significant to the *Taylor* Court's decision. *Id.* at 704 (internal quotes and citation omitted). The same cannot be said in this case. Here, Deputy Lowery specifically told Mr. Blekicki he had a right to refuse the FSE's and that his refusal could not be used against him in court. Any reasonable person in that situation could have concluded that there was a "safe harbor" for him to refuse the FSE's without any adverse consequences. Deputy Lowery's additional statement that "If you refuse to do field sobriety tests, I have nothing to go on. I have no way to make a determination, only to go with the one thing that you did do, the [HGN]…" does not change the outcome. It is too vague of a statement to signal to Mr. Blekicki that the arrest decision will be affected by his refusal, especially in the context of the other, more problematic statements. Accordingly, the evidence of Mr. Blekicki's refusal to perform FSE's is inadmissible at his trial.

WHEREFORE it is **ORDERED and ADJUDGED** as follows:

The Motion to Suppress is granted in part and denied in part. All evidence of the refusal to perform field sobriety exercises is hereby suppressed. All evidence of the refusal to provide a breath sample is hereby suppressed. The remainder of the Motion is denied.

DONE AND ORDERED in Chambers in Deland, Volusia County, Florida.

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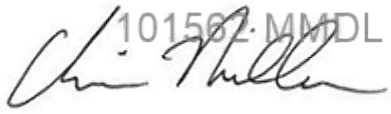

e-Signed 11/23/2022 10:59 AM 2022 101562 MMDL

A. CHRISTIAN MILLER
COUNTY JUDGE

Copy to:
Elba Roman-Pacheco, Esq.
Judith Jensen, Esq.

Tab 35
Publications

A Guide to Florida's Juvenile Sentencing Issues after *Miller v. Alabama* and *Graham v. Florida*

Office of the State Attorney, 7th Judicial Circuit – The Honorable R.J. Larizza

Last published on November 9, 2016

Contents

Topical Outline

What does *Miller v. Alabama* hold?

- Juveniles are different, and thus 8th Amendment forbids mandatory life-without-parole sentencing schemes for juveniles convicted of homicides
- Trial courts must conduct individualized sentencings for juveniles convicted of a homicide
- At sentencing, judge must consider defendant's youth and its "attendant circumstances"; such as immaturity, impetuosity, failure to appreciate risk and consequences
- Trial courts should also consider the family and home environment, as well as the circumstances of the homicide offense, including the extent of participation and the way familial and peer pressures may have affected the defendant; as well as the potential for rehabilitation

Are life-without-parole sentences totally prohibited under *Miller v. Alabama*?

- No, only *mandatory* life-without-parole sentencing schemes are unconstitutional
- *Miller* recognizes that a judge may still sentence a juvenile to life without parole for a homicide; but it first must conduct an individualized sentencing to determine if appropriate
- However, Ch. 14-220 built in mandatory 25-year sentencing review hearings even for first degree premeditated and felony murder; so effectively, unless the defendant has a prior conviction for an enumerated felony under F.S. § 921.1402(2)(a), true life without parole (or a review hearing) is no longer a realistic option in Florida

Are discretionary life sentences for homicides affected by *Miller v. Alabama*?

- Possibly, if the Court did not consider the "distinctive attributes of youth" and its attendant circumstances, see *Landrum v. State*, 192 So.3d 459 (Fla. 2016) (remanding discretionary life sentence for second degree murder for new sentencing under 921.1401 because the trial court did not consider these factors)

Is *Miller v. Alabama* retroactive?

- Yes, see *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016); *Falcon v. State*, 162 So.3d 954 (Fla. 2015)

What sentencing law applies to *Miller* effected defendants if their case arose prior to July 1, 2014 – the effective date of Ch. 14-220?

- Ch. 14-220 applies retroactively to *Miller* defendants, despite the effective date and despite the Savings Clause of Fla. Const. Art. X, § 9; see *Horsley v. State*, 160 So.3d 393 (Fla. 2015) (also rejecting statutory revival of prior law that imposed life with parole eligibility after twenty-five years)

How long do Florida defendants affected by *Miller* have to file motions post-conviction relief under Florida Rule of Criminal Procedure 3.850?

- 2 years from date of mandate in *Falcon v. State* (opinion issued March 19, 2015)

What does *Graham v. Florida* hold?

- Categorically bans life-without-parole sentences against juveniles for non-homicide crimes
- This is unlike *Miller* which is not a total ban
- Sentence must provide a meaningful opportunity for release upon demonstrated maturity and rehabilitation within the juvenile's natural lifetime

Does *Graham v. Florida* mean a juvenile defendant must be released in their natural lifetime?

- No, *Graham* only holds that 8th Amendment guarantees *meaningful opportunity* for release based on demonstrated maturity and rehabilitation, not release itself

Is there an exception to *Graham* for separate criminal offenses/episodes?

- No, see *Francis v. State*, 2015 WL 7740389 (3rd DCA 2015)

Who has burden of proof regarding an alleged *Graham* violation?

- Juvenile defendant has burden of proving no meaningful opportunity for release based upon demonstrated maturity and rehabilitation within natural lifetime, see *Davis v. State*, 199 So.3d 546 (4th DCA 2016)

Can a judge sentence a juvenile defendant to life without parole on a non-homicide offense if there is also a qualifying homicide charge (2nd degree or 1st degree murder)?

- No, see *Lawton v. State*, 181 So.3d 452 (Fla. 2015), explicitly finding no "homicide exception" to *Graham v. Florida*

How many years equals a *de facto* life sentence sufficient to establish a *Graham* violation?

- Varies based on circumstances:
    a) 50 year sentence does <u>not</u> violate *Graham*, see *Thomas v. State*, 78 So.3d 644 (1st DCA 2011); *Williams v. State*, 197 So.3d 569 (2nd DCA 2016)
    b) 60 year sentence with review mechanism would <u>not</u> violate *Graham*, see *Barnes v. State*, 175 So.3d 380 (5th DCA 2015) (affirming sixty year sentence, but remanding for inclusion of review mechanism in sentencing documents)
    c) 65 year sentence does violate *Graham*, see *Morris v. State*, 198 So.3d 31 (2nd DCA 2015)
    d) 70 year sentence violated *Graham*, see *Cunningham v. State*, 187 So.3d 937 (4th DCA 2016); *Gridine v. State*, 175 So.3d 672 (Fla. 2015)
    e) 75 year sentence with significant basic and meritorious gain time eligibility does <u>not</u> violate *Graham*, see *Smith v. State*, 93 So.3d 371 (1st DCA 2012)

f) 80 year sentence does violate *Graham*; see *Floyd v. State*, 87 So.3d 45 (1st DCA 2012); *Davis v. State*, 182 So.3d 700 (4th DCA 2015)
g) 80 year sentence with significant basic and meritorious gain time eligibility does not violate *Graham*, see *Davis v. State*, 199 So.3d 546 (4th DCA 2016)
h) 85 year sentence violates *Graham*, see *Francis v. State*, 2015 WL 7740389 (3rd DCA 2015)
i) 90 year sentence violates *Graham*, see *Henry v. State*, 175 So.3d 675 (Fla. 2015)
j) 90 year sentence without review mechanism violates *Graham*, see *Stephenson v. State*, 197 So.3d 1126 (3rd DCA 2016)
k) 93-year aggregate, minimum mandatory sentence violates *Graham*, see *Cook v. State*, 190 So.3d 215 (4th DCA 2016)

How does parole eligibility effect an alleged *Miller* violation?

- Generally, Florida's existing parole system does not satisfy *Miller's* requirement for individualized sentencing; see *Atwell v. State*, 197 So.3d 1040 (Fla. 2016)
- However, at least one case has held where the Presumptive Parole Release Date (PPRD) does not exceed the life expectancy of the defendant, that there is no *Miller* violation, see *Cunningham v. State*, 54 So.3d 1045 (3rd DCA 2011)
- Another case remanded to trial court for evidentiary hearing concerning PPRD determinations, signaling this information may be dispositive of an alleged *Miller* violation, see *Stallings v. State*, 198 So.3d 1081 (5th DCA 2016)

How does gain time eligibility effect an alleged *Miller* or *Graham* violation?

- Depending on the amount and type of gain time eligibility, as compared to the life expectancy of the defendant, this may suffice for "meaningful opportunity for release"; see below cases for illustrations:
    a) *Smith v. State*, 93 So.3d 371 (1st DCA 2012) (affirming 80 year sentence where defendant eligible for 10 days per month basic gain time and 20 days per month of meritorious gain time);
    b) *Williams v. State*, 197 So.3d 569 (2nd DCA 2016) (affirming 50 year sentence and noting gain time eligibility after minimum mandatory portion of sentence completed);
    c) *Davis v. State*, 199 So.3d 546 (4th DCA 2016) (affirming 75 year prison sentence where defendant had opportunity to receive substantial gain time and expected to be released in his mid-50s)

Where can I find information about parole eligibility?

- Florida Department of Corrections website contains information concerning parole eligibility: http://www.dc.state.fl.us/oth/inmates/parole.html

Where can I find information about gain time types and eligibility for different offense dates?

- Florida Statute § 944.275 controls gain time, and provides the following eligibility based upon date of offense:

  a) (4)(a) provides basic gain time shall be granted at 10 days per month

  b) (4)(b) provides incentive gain time may be granted as follows:

Date of offense	Gain time eligibility
Prior to January 1, 1994	Up to 20 days per month
From January 1, 1994 to October 1, 1995	Up to 25 days per month for level 1-7 offenses Up to 20 days per month for level 8-10 offenses
October 1, 1995 to present	Up to 10 days per month but minimum of 85% of sentence must be served; no gain time for life sentences

Where can I find information about a juvenile's life expectancy?

- The Centers for Disease Control and Prevention website contains information concerning life expectancy: http://www.cdc.gov/nchs/fastats/life-expectancy.htm

Does a life sentence imposed as a minimum mandatory under 10-20-Life law supersede an alleged *Miller* or *Graham* violation?

- No, see *Wade v. State*, 2016 WL 5874429 (1st DCA 2016) (remanding a minimum mandatory life sentence for discharge of firearm causing death pursuant to 10-20-Life for resentencing)
- But also see *St. Val v. State*, 174 So.3d 447 (4th DCA 2015) (affirming a 25-year minimum mandatory sentence where juvenile defendant would definitely be released within his lifetime)

What factors must a court consider in conducting a sentencing/resentencing based on a *Graham* or *Miller* violation?

- The trial court must make a finding whether the defendant actually killed, intended to kill, or attempted to kill.

- Additionally, Florida Statute § 921.1401(2) states the court shall consider factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:
    a) The nature and circumstances of the offense committed by the defendant.
    b) The effect of the crime on the victim's family and on the community.
    c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
    d) The defendant's background, including his or her family, home, and community environment.
    e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
    f) The extent of the defendant's participation in the offense.
    g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
    h) The nature and extent of the defendant's prior criminal history.
    i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
    j) The possibility of rehabilitating the defendant.

Is *Graham v. Florida* retroactive?

- Yes; see *Peterson v. State*, 193 So.3d 1034 (5th DCA 2016)

Is the State allowed to have a psychologist or psychiatrist examine a defendant for use at a sentencing hearing?

- Yes, if the defendant is offering an expert who examined the defendant, then the state can have its own expert also examine the defendant; however, the examination is limited to the mitigating factors raised by the defendant's expert; see *Beckman v. State*, 147 So.3d 584 (3rd DCA 2014)

Are all juveniles entitled to a sentencing review hearing?

- See Appendix A.

Does the judge have to make written findings whether a review hearing is required or not?

- Yes, F.S. §§ 775.082(1)(b)3 and (3)(a)5c and (3)(b)2c each require the court to make written findings of the defendant's eligibility for a sentencing review hearing based upon whether the defendant killed, intended to kill, or attempted to kill.

What factors must a court consider at a sentencing review hearing?

- Florida Statute § 90.1402 states the court shall consider any factor it deems appropriate, including but not limited to:
    a) Whether the juvenile offender demonstrates maturity and rehabilitation.
    b) Whether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing.

c) The opinion of the victim or the victim's next of kin. The absence of the victim or the victim's next of kin from the sentence review hearing may not be a factor in the determination of the court under this section. The court shall permit the victim or victim's next of kin to be heard, in person, in writing, or by electronic means. If the victim or the victim's next of kin chooses not to participate in the hearing, the court may consider previous statements made by the victim or the victim's next of kin during the trial, initial sentencing phase, or subsequent sentencing review hearings.
d) Whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person.
e) Whether the juvenile offender has shown sincere and sustained remorse for the criminal offense.
f) Whether the juvenile offender's age, maturity, and psychological development at the time of the offense affected his or her behavior.
g) Whether the juvenile offender has successfully obtained a high school equivalency diploma or completed another educational, technical, work, vocational, or self-rehabilitation program, if such a program is available.
h) Whether the juvenile offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense.
i) The results of any mental health assessment, risk assessment, or evaluation of the juvenile offender as to rehabilitation.

Case law summaries

U.S. SUPREME COURT

Graham v. Florida, 560 U.S. 48 (2010)

- Held 8th Amendment bans life sentences without possibility for parole for juvenile non-homicide offenders
- Recognizes that State not required to guarantee eventual release of non-homicide juvenile offenders
- State must give defendants "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"
- 8th Amendment does not require state to release juvenile non-homicide offender within his lifetime; just prohibits State from making that judgement at outset

Miller v. Alabama, 132 S.Ct. 2455 (2012)

- Held *mandatory* life without possibility of parole for juvenile offenders violates 8th amendment
- Juvenile defendants entitled to individualized sentencings where trial court can consider youth and attendant circumstances
- Discretionary life without parole sentences for juvenile homicide defendants are permissible, but sentencing court must conduct individualized sentencing

Alleyne v. United States, 133 S.Ct. 2151 (June 17, 2013)

- Any fact that increases mandatory minimum sentence for crime is an "element" of the crime, not sentencing factor that must be submitted to the jury.
- Finding as to whether defendant has brandished, as opposed to merely carried, firearm in connection with crime of violence, because it would elevate the mandatory minimum term for firearms from five to seven years, was element of separate, aggravated offense that had to be found by the jury.

Montgomery v. Louisiana, 136 S.Ct. 718 (2016)

- *Miller v. Alabama* is retroactive

Tatum v. Arizona, 2016 WL 1381849 (Oct. 31, 2016)

- *Miller* requires "that a sentencer decide whether the juvenile offender before it is a child "whose crimes reflect transient immaturity" or is one of "those rare children whose crimes reflect irreparable corruption" for whom a life without parole sentence may be appropriate"

FLORIDA SUPREME COURT

Henry v. State, 175 So.3d 675 (Fla. 2015)

- Extended *Graham* to lengthy term-of-years sentences
- 90 year aggregate sentence on non-homicide charges violated *Graham*
- 8th Amendment will not tolerate prison sentences that lack a review mechanism for evaluating special class of offenders for demonstrable maturity and reform in future

Gridine v. State, 175 So.3d 672 (Fla. 2015)

- 70 year prison sentence on non-homicide charges violated *Graham* because it did not provide for meaningful opportunity for early release based upon demonstration of his maturity and rehabilitation

Falcon v. State, 162 So.3d 954 (Fla. 2015)

- *Miller* applies retroactively to juvenile offenders whose convictions and sentences were final at time *Miller* was decided
- Proper remedy is to resentence under new statute (921.1401), citing *Horsley*
- Holds 775.082(1) – requiring mandatory life sentences for capital murder – unconstitutional as applied to juveniles
- Juveniles have 2 years to file motion from date of mandate in *Falcon* (opinion issued March 19, 2015)
- Held "trial court" must make findings whether juvenile actually killed, intended to kill or attempted to kill (but see *Alleyne* – 6th amendment requires jury make findings for minimum mandatory sentences)

Horsley v. State, 160 So.3d 393 (Fla. 2015)

- Held proper remedy is to apply new statutes to all juveniles affected by *Miller*
- Rejected statutory revival argument because legislature passed new law fixing issue

Lawton v. State, 181 So.3d 452 (Fla. 2015)

- Held there is no homicide-exception to *Graham* (commission of homicide during same criminal episode of non-homicide offenses allowing life without parole sentence for non-homicide offenses)
- Remanded for resentencing on non-homicide offenses using new statute 921.1401

Atwell v. State, 197 So.3d 1040 (Fla. 2016)

- Held Florida's existing parole system does not provide for individualized consideration of juvenile status as required by *Miller*
- Parole system ineffective because (1) commission is required to give primary weight to seriousness of offense and offender's record, and (2) none of mitigating factors parole commission can consider recognize diminished culpability of juvenile

- 1990 offense date; juvenile sentenced to life with parole after 25 years on 1st degree murder, and life without parole on armed robbery; presumptive release date was 2130 (140 years after crime and exceeding Atwell's life expectancy)
- Atwell's sentence was "virtually indistinguishable" from life without parole, thus unconstitutional under *Miller*
- This case has a helpful explanation of how the parole system works in Florida

Landrum v. State, 192 So.3d 459 (Fla. 2016)

- Held discretionary life without parole sentence for juvenile convicted of 2nd degree murder violated *Miller* because judge not required to, and did not, consider "the distinctive attributes of youth" and its attendant circumstances
- Remanded for individualized sentencing under new statutes

1ST DCA

Abrakata v. State, 168 So.3d 251 (1st DCA 2015)

- 25 year sentence for non-homicide crimes; including 25 year min-man for discharge of firearm causing great bodily harm
- Held neither the imposition of 25-year minimum mandatory, nor 25 year sentence as a whole, violated *Graham* because defendant will be released in his 40s
- Absent violation of Graham, there is no legal basis to retroactively apply the new statutes
- This case is very important because it establishes (along with *Davis* from 4th DCA, see below) that a Defendant must first establish their sentence violates *Graham* before they are entitled to a new sentencing (thus a harmless error analysis could apply to any cases where a juvenile defendant is expected to be released within their lifetime expectancy)

Wade v. State, 2016 WL 5874429 (1st DCA 2016)

- Juvenile defendant convicted of 2nd degree murder with minimum mandatory life sentence due to discharge of firearm causing death
- Reversed and remanded for resentencing in conformance with 775.082, 921.1401, and 921.1402

Romero v. State, 105 So.3d 550 (2012)

- Declines to extend *Graham's* bar on mandatory life-without-parole sentences to 18-year-old adults

Wade v. State, 2016 WL 5874429 (1st DCA 2016)

- Minimum mandatory life sentence for discharge of firearm causing death under 10-20-Life imposed on juvenile reversed for resentencing under new statutes
- Cites to *Landrum* (which extended *Miller* and new sentencing statutes to even discretionary life-without-parole sentences)

Austin v. State, 158 So.3d 648 (1st DCA 2014)

- Defendants must preserve issues of sentencing errors by either objecting to sentence below or by timely filing 3.800 motions
- Trial court conducted individualized sentencing hearing on juvenile convicted of first degree murder (as well as a separate attempted murder), gave 135 year aggregate sentence
- Affirmed sentences because defense counsel did not preserve the sentencing error issue (see case for discussion of evidence the sentencing court was presented with by defense counsel regarding defendant's youth; court went to great lengths to affirm sentence – probably because trial court made good effort to follow *Miller's* requirement of individualized sentencing and considered defendant's youth)

Collins v. State, 189 So.3d 342 (1st DCA 2016)

- Affirmed 55 year sentence for non-homicide crimes because defendant's release dates (earliest and latest) did not exceed his life expectancy
- Also held he was not entitled to sentencing review hearing because 90.1402 was prospective only; distinguishing *Horsley* based on defendant there having an unconstitutional sentence, thus resentencing was already required
- Also found Savings Clause prohibited retroactive application of 90.1402
- Concurring opinion advocated review hearings are required based upon (1) statutory interpretation of different terms used in new statutes combined with rule of lenity, (2) possible disparate treatment of non-homicide offenders vis-à-vis homicide offenders given *Horsley's* decision that 90.1402 did apply retroactively to cure *Miller* violations, and (3) *Graham* both barred life without parole sentences and required opportunity for *early* release

Ortiz v. State, 188 SO.3d 113 (1st DCA 2016)

- State presented some evidence relating to factors listed under 921.1401 at sentencing on Defendant's first degree murder charge, but 1st DCA held it was not equivalent of individualized sentencing hearing required by *Horsley* and 90.1401
- Reversed and remanded for resentencing under 90.1401 and 90.1402 on homicide count only
- Affirmed concurrent 50-year sentence on home-invasion robbery with firearm count because that would not exceed his life expectancy
- Court noted anomaly that he will be entitled to sentencing review hearing on his homicide count, but not his non-homicide count

Franklin v. State, 141 So.3d 210 (1st DCA 2014)

- Held Defendant's 1000-year sentences for non-homicide crimes were not in violation of *Graham* because he is parole-eligible
- Concurring opinion describes extremely horrific facts of Defendant's crimes and their effects on his victims – so 1st DCA probably going out of its way to affirm his sentences

- (But see *Atwell* – critiquing parole system's inadequacies for complying with *Miller/Graham*)
- This case cited by Justice Polston in his dissent in *Atwell*

Lambert v. State, 170 So.3d 74 (1st DCA 2015)

- Affirmed 15 year sentence for vehicular homicide and non-homicide offense in same episode
- Held no *Graham* violation established – defendant to be released in his twenties or early thirties at latest

Kelsey v. State, 183 So.3d 439 (1st DCA 2015)

- Affirmed 45-year post-*Graham* resentence for non-homicides;
- Held resentencing under new statutes not required absent *Graham* violation (in the resentencing) and 45 years not a *de facto* life sentence
- Certified question to FSC – whether resentencing post-Graham but pre-Ch. 2014-220 requires resentencing

Smith v. State, 93 So.3d 371 (1st DCA 2012)

- 1985 offense dates; 80-year aggregate sentence for non-homicides did not violate *Graham*
- Affirmance based on his eligibility for basic gain time (10 days per month) and good behavior gain time (20 days per month) which would significantly reduce his sentence
- Held this satisfied "meaningful opportunity for release" required by *Graham*

Thomas v. State, 78 So.3d 644 (1st DCA 2011)

- 50 year sentence for non-homicides does not violate *Graham* as does not exceed defendant's life expectancy

Floyd v. State, 87 So.3d 45 (1st DCA 2012)

- Combined 80 year sentences for non-homicide crimes are functional equivalent of life sentence because exceed his life expectancy
- Reversed/remanded for new sentencing

Britten v. State, 181 So3d 1215 (1st DCA 2015)

- This case may be helpful to the analysis of whether jury findings are required on *Miller* or *Graham* re-sentencings considering the now-required findings of actually killed, intended to kill, or attempted to kill
- Defendant convicted of sexual battery and designated a dangerous sexual offender. Appeal challenges the 25-year minimum mandatory sentence resulting from the designation.
- The trial court erred in making the finding required to support the designation, but the error was harmless because the record demonstrates beyond a reasonable doubt that a rational jury would have made this finding.

- Judgment and sentence affirmed despite fact that jury did not make necessary finding that the defendant caused "serious personal injury to the victim as a result of the commission of the offense" Fla Stat § 794.0115(2)(a)
- Defendant did not dispute that the victim had been beaten – injuries were extensive – merely that the injuries accompanied a rape. Defense theory was drug deal gone bad.
- A factual finding that leads to an increased minimum mandatory term for an underlying crime must be found by a jury, citing *Alleyne, Apprendi, and Blakely*. Any fact that increases the minimum mandatory "floor" for a crime must be found by the jury.
- The error is not per se reversible error. It is well-settled that *Apprendi* and *Blakely* errors are subject to harmless error analysis.

2ND DCA

Ejak v. State, 2016 WL 6143145 (2nd DCA 2016)

- 17 year old defendant convicted of 1st degree murder after *Miller v. Alabama* decided, but before F.S. 921.1401 passed
- Trial court recognized that mandatory life sentence for juvenile was unconstitutional based upon *Miller*, so it conducted a sentencing hearing and considered many of factors subsequently required by 921.1401
- Trial court found defendant was entitled to sentencing review hearing, but was not entitled to resentencing based on passage of 921.1401 after defendant's sentencing
- 2nd DCA affirmed because defendant had already been given an individualized sentencing hearing by the trial court considering factors in *Miller*; and trial court had already ruled he would be entitled to sentencing review hearing

Williams v. State, 197 So.3d 569 (2nd DCA 2016)

- *Graham* applies retroactively
- Resentencing not required though because no *Graham* violation
- Affirmed 50 year sentence, including 20 year minimum mandatory, for non-homicide crimes as not *de facto* life sentence
- Noted defendant eligible for gain time on portion of sentence after 20 year minimum mandatory as well

Howard v. State, 180 So.3d 1135 (2nd DCA 2015)

- PCA because defendant is eligible for parole; but see concurring opinion of Judge Altenbernd arguing Howard should be able to challenge the parole system's inadequacies to address the *Miller* factors, and recognizing a possible equal protection argument based thereon

Morris v. State, 198 So.3d 31 (2nd DCA 2015)

- 65 year sentence for non-homicides did not provide meaningful opportunity for release – held unconstitutional

- Juvenile's life expectancy is relevant to determination of whether lengthy term-of-years sentence is constitutional

Lee v. State, 130 So3d 707 (2nd DCA 2013)

- Another case that may be helpful in the analysis of the necessity of jury finding on re-sentencing a *Miller* or *Graham* defendant based on the killed/intended to kill/attempted to kill findings required by 775.082.
- 15 year old defendant sentenced to 40-years' incarceration with a 25-year minimum mandatory for attempted 1st degree murder
- Competent and substantial evidence demonstrated that the defendant shot the victim and that victim suffered permanent, disabling injuries. At rehearing, the defendant admitted the crime and took responsibility for his actions.
- The verdict form at trial did not require the jury to make express findings that the defendant "discharged" the firearm and caused "great bodily harm"
- An interrogatory verdict form is the preferred method to address Fla Stat § 775.087 but a "clear jury finding" such as the one in *Gentile* can lead to the same result.
- *Gentile* extends a harmless error analysis because of the overwhelming evidence that that defendant used a deadly weapon.
- Court expresses concern that the *Galindez* test – that no rational jury could find otherwise – could become a slippery slope that to frequently temps an appellate court to dispense with the constitutional right to trial by jury but applies harmless error analysis to the case at bar and upholds the conviction and sentence.
- Court not required to empanel jury to make special findings because record is clear

3RD DCA

Cunningham v. State, 54 So.3d 1045 (3rd DCA 2011)

- Affirming 4 life sentences for non-homicide crimes because defendant eligible for parole and his PPRD was 2026 and next parole re-interview was in 2 years
- This case has limited applicability in light of *Atwell* – see above

Neely v. State, 126 So.3d 342 (3rd DCA 2013)

- Reversing 4 life sentences for homicide and non-homicide crimes for resentencing per *Miller*
- Recognized breach in Florida Statutes based on *Miller* and lack of other valid sentencing options (this case was decided pre-Ch.14-220)

Beckman v. State, 147 So.3d 584 (3rd DCA 2014)

- State is entitled to have rebuttal expert examine a defendant for individualized *Miller* sentencings – but exam is limited to mitigation factors identified by defendant's expert
- Defendant listed psychologist on sentencing witness list to offer evidence of his Asperger's disorder; state sought to have its own psychologist examine him

- Trial court allowed state's expert to examine defendant, and defendant sought writ of prohibition
- 3rd DCA denied the petition, stating goal was to "level the playing field" ; but limited State's expert's examination to the mitigating factors identified by the defendant's expert
- Court noted a lack of case law in Florida regarding the procedural rights of defense and state in this area

Stephenson v. State, 197 So.3d 1126 (3rd DCA 2016)

- 90 year aggregate sentence without review mechanism for early release for several non-homicide crimes violated *Graham* and *Henry*

Torres v. State, 184 So.3d 1239 (3rd DCA 2016)

- When defendant has life without parole sentences for *both* homicide and non-homicide offenses that violate *Miller* and *Graham*, proper remedy is to remand both counts for resentencing under Ch. 14-220
- State argued proper remedy for non-homicide count was to remand for resentencing under governing statute in place at time of offense, not new Ch.14-220 sentencing laws (essentially arguing Ch. 14-220 not retroactive for non-homicide offenses violating *Graham*)
- 3rd DCA disagreed with State, remanded non-homicide back for resentencing under Ch. 14-220 along with the homicide count

Francis v. State, 2015 WL 7740389 (3rd DCA 2015)

- 85 year aggregate sentence for non-homicide crimes violated *Graham*
- Court rejected separate criminal episode exception to *Graham* argued for by State

4TH DCA

Davis v. State, 199 So.3d 546 (4th DCA 2016)

- 16 year old defendant convicted of 3 non-homicide offenses, sentenced to 75 years prison
- Held that sentence does not violate *Graham v. Florida* because he has opportunity to receive substantial amount of gain time (1991 offense dates) and is expected to be released in his mid-50s
- Juvenile defendants sentenced prior to the Stop Turning Out Prisoners Act (enacted 85% rule - 944.275(4)(b)) generally have meaningful opportunity for early release – and this should be considered
- Burden on juvenile to show his/her sentence is unconstitutional because deprives him/her of meaningful opportunity for release during natural lifetime
- Certifies four questions for FSC

St. Val v. State, 174 So.3d 447 (4th DCA 2015)

- Affirming 25 year minimum mandatory for non-homicide offense imposed on juvenile because it provided for definite release within juvenile's lifetime

Daugherty v. State, 96 So.3d 1076 (4th DCA 2012)

- Reversing and remanding for resentencing of discretionary life sentence for second degree murder
- Held although trial court heard extensive evidence of Defendant's bad childhood and remorse, trial court did not consider "distinctive attributes of youth" referenced in *Miller*

Janvier v. State, 123 So.3d 647 (4th DCA 2013)

- Declined to extend *Miller* or *Graham* to those defendants who are under 21 ("youthful offenders")

Hadley v. State, 190 So.3d 217 (4th DCA 2016)

- A contemporaneous capital felony cannot be considered as a prior criminal history under F.S. 921.1401(2)(h) if it was part of same criminal transaction or episode
- "transition period" case – the sentencing occurred after *Miller* but before Ch. 14-220 passed
- Although trial court considered many of factors from *Miller* later codified in F.S. 921.1401, was still reversed/remanded for new sentencing because of error with prior capital felony consideration and because trial court erroneously thought it had only 2 options: life without parole or life without parole before 25 year years (statutory revival)

Cook v. State, 190 So.3d 215 (4th DCA 2016)

- 93-year, minimum mandatory sentence for non-homicide crimes did not give juvenile defendant meaningful opportunity for release based on maturity and rehabilitation, thus violated *Graham*

Cunningham v. State, 187 So.3d 937 (4th DCA 2016)

- 70-year sentence for non-homicide crimes violated *Graham*

Troche v. State, 184 So.3d 1174 (4th DCA 2015)

- Review hearing for sentences on crimes committed as juvenile not required if defendant serving independent life sentences on crimes later committed as an adult

Davis v. State, 182 So.3d 700 (4th DCA 2015)

- 80 year sentence for VOP's as adult, where underlying non-homicide crimes committed while defendant was juvenile, violated *Graham* and *Henry*

5TH DCA

Peterson v. State, 193 So.3d 1034 (5th DCA 2016)

- 56 year sentence for 17 year old juvenile for non-homicide offenses
- Held lengthy term-of year sentences that don't provide for meaningful opportunity for early release (i.e. a review hearing) are unconstitutional
- Finding no material difference between *Miller* and *Graham* for retroactivity analysis, holds *Graham* applies retroactively
- Remanded for resentencing under new statutes

Randolph v. State, 2016 WL 4945116, 5th DCA, Sept. 16, 2016

- 2001 offense date; 17 year old defendant convicted of 2nd degree murder, sentenced to 100 years prison with 25 year minimum mandatory
- Even though life sentence was discretionary (2nd degree murder), still reversed based on *Landrum v. State* (extended *Miller* to discretionary life without parole sentences)
- Sentencing court did not "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison"
- Reversed and remanded for resentencing in conformance with 775.082, 921.1401, and 921.1402

Tarrand v. State, 199 So.3d 507, 5th DCA, Sept. 2, 2016

- (1993 offense date) 51 year sentence for 2nd degree murder reversed and remanded for resentencing under new statutes
- Court noted that his initial sentence (51 years) did not violate 8th Amendment, but remanded anyway for resentencing under the new statutes based on *Thomas v. State*, 177 So.3d 1275 (Fla. 2015) (quashing underlying decision approving a 40-year sentence on juvenile homicide offender and remanding for resentencing under new statutes); and *Henry*
- This case, viewed in light of *Tyson*, *Peterson, Barnes,* and *Brooks,* strongly suggests the 5th DCA is more concerned about the review mechanism being in place, rather than the specific term of years imposed

Tyson v. State, 2016 WL 4585974, 5th DCA, Sept. 2, 2016

- 45 year (stacked) sentences for 3 non-homicide crimes was unconstitutional because it did not provide meaningful opportunity for early release based upon demonstrated maturity and rehabilitation (no review ordered)
- Court explicitly held that 45 years was not the problem, it was the lack of a review after 20 years as required by 921.1402
- Certified conflict with several cases and certified several questions to FSC

Bissonette v. State, 2016 WL 4945160, (5th DCA 2016)

- Presumptive Parole Release Date (PPRD) 100 years after crime occurred was *de facto* life sentence without parole for juvenile offender in light of *Atwell* and *Miller*

Stallings v. State, 198 So.3d 1081 (5th DCA 2016)

- 1973 offense date; juvenile sentenced to life with possibility of parole, but PPRD was not clear based on records
- Remanded for evidentiary hearing to determine entitlement to resentencing under *Atwell*

Williams v. State, 171 SO.3d 143 (5th DCA 2015)

- Reversed/remanded mandatory life sentence for first degree murder based on *Miller* for resentencing under new statutes
- Recognized that juvenile homicide defendants can still get life without parole under *Miller*, but must have individualized sentencing

- Held court must make findings of whether Williams actually killed, intended to kill, or attempted to kill because jury did not make special finding he possessed gun
- No mention of *Alleyne* (6th Amendment requires jury fact finding for minimum mandatories)

Barnes v. State, 175 So.3d 380 (5th DCA 2015)

- Juvenile sentenced to 60 years aggregate sentence for non-homicide crimes
- Held failure to include review mechanism violated *Graham*
- Affirmed sentence, but remanded to amend sentencing documents to include a review hearing in 20 years per new statute

Brooks v. State, 186 So.3d 564 (5th DCA 2015)

- 65 year sentence for non-homicide crimes violated *Graham* because they failed to provide meaningful opportunity to obtain release

Appendix A

Sentencing Structure for Defendants under 18 at the time of their Offense					
Crime Convicted of	**Can they be sentenced to Life**	**Is there a minimum amount of prison they can recieve**	**Are they entitled to a Sentencing hearing based on amount of time sentenced to prison?**	**When is the Sentencing hearing to be held**	**Are they entitled to an additional Sentence Review Hearing after the first one**
1st degree murder - killer	Yes - with an appropriate hearing that includes the factors in F.S. 921.1401	Yes - 40 years	Yes - if Sentenced to more than 25 years in prison. See 921.1402(6). However, they are not eligible if they have a prior conviction for one of the enumerated felonies in 921.1402(2)a	25 years after the intial sentencing date	No
1st degree murder - not killer	Yes - with an appropriate hearing that includes the factors in F.S. 921.1401	No	Yes - if sentenced to more than 15 years in prison. See 921.1402(6).	15 years after the intial sentencing date	No
2nd Degree Murder or Attempted First Degree Murder with a Weapon - killer	Yes - with an appropriate hearing that includes the factors in F.S. 921.1401	No	Yes - if Sentenced to more than 25 years in prison. See 921.1402(6).	25 years after the intial sentencing date	No
2nd Degree Murder or Attempted First Degree Murder with a Weapon - not killer	Yes - with an appropriate hearing that includes the factors in F.S. 921.1401	No	Yes - if sentenced to more than 15 years in prison. See 921.1402(6).	15 years after the intial sentencing date	No
Life felony or PBL Felony	Yes - with an appropriate hearing that includes the factors in F.S. 921.1401	No	Yes - if sentenced to more than 20 years in prison. See 921.1402(6).	20 years after the intial sentencing date	Yes - 10 years after the intial hearing

Appendix B

775.082 Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.—

(1) …

(b) 1. A person who actually killed, intended to kill, or attempted to kill the victim and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age shall be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. If the court finds that life imprisonment is not an appropriate sentence, such person shall be punished by a term of imprisonment of at least 40 years. A person sentenced pursuant to this subparagraph is entitled to a review of his or her sentence in accordance with s. 921.1402(2) (a).

2. A person who did not actually kill, intend to kill, or attempt to kill the victim and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or by a term of years equal to life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. A person who is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).

3. The court shall make a written finding as to whether a person is eligible for a sentence review hearing under s. 921.1402(2) (a) or (c). Such a finding shall be based upon whether the person actually killed, intended to kill, or attempted to kill the victim. The court may find that multiple defendants killed, intended to kill, or attempted to kill the victim.

...

(3) A person who has been convicted of any other designated felony may be punished as follows: …

(a) …

5. Notwithstanding subparagraphs 1.-4., a person who is convicted under s. 782.04 of an offense that was reclassified as a life felony which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or by a term of years equal to life imprisonment if the judge conducts a sentencing hearing in accordance with s. 921.1401 and finds that life imprisonment or a term of years equal to life imprisonment is an appropriate sentence.

a. A person who actually killed, intended to kill, or attempted to kill the victim and is sentenced to a term of imprisonment of more than 25 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(b).

b. A person who did not actually kill, intend to kill, or attempt to kill the victim and is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).

c. The court shall make a written finding as to whether a person is eligible for a sentence review hearing under s. 921.1402(2) (b) or (c). Such a finding shall be based upon whether the person actually killed, intended to kill, or attempted to kill the victim. The court may find that multiple defendants killed, intended to kill, or attempted to kill the victim.

…

(b)…

2. Notwithstanding subparagraph 1., a person convicted under s. 782.04 of a first degree felony punishable by a term of years not exceeding life imprisonment, or an offense that was reclassified as a first degree felony punishable by a term of years not exceeding life, which was committed before the person attained 18 years of age may be punished by a term of years equal to life imprisonment if the judge conducts a sentencing hearing in accordance with s. 921.1401 and finds that a term of years equal to life imprisonment is an appropriate sentence.

a. A person who actually killed, intended to kill, or attempted to kill the victim and is sentenced to a term of imprisonment of more than 25 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(b).

b. A person who did not actually kill, intend to kill, or attempt to kill the victim and is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).

c. The court shall make a written finding as to whether a person is eligible for a sentence review hearing under s. 921.1402(2) (b) or (c). Such a finding shall be based upon whether the person actually killed, intended to kill, or attempted to kill the victim. The court may find that multiple defendants killed, intended to kill, or attempted to kill the victim.

…

(c) Notwithstanding paragraphs (a) and (b), a person convicted of an offense that is not included in s. 782.04 but that is an offense that is a life felony or is punishable by a term of imprisonment for life or by a term of years not exceeding life imprisonment, or an offense that was reclassified as a life felony or an offense punishable by a term of imprisonment for life or by a term of years not exceeding life imprisonment, which was committed before the person attained 18 years of age may be punished by a term of

imprisonment for life or a term of years equal to life imprisonment if the judge conducts a sentencing hearing in accordance with s. 921.1401 and finds that life imprisonment or a term of years equal to life imprisonment is an appropriate sentence. A person who is sentenced to a term of imprisonment of more than 20 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2) (d).

…

Appendix C

921.1401 Sentence of life imprisonment for persons who are under the age of 18 years at the time of the offense; sentencing proceedings.—

(1) Upon conviction or adjudication of guilt of an offense described in s. 775.082(1)(b), s. 775.082(3)(a)5., s. 775.082(3)(b)2., or s. 775.082(3)(c) which was committed on or after July 1, 2014, the court may conduct a separate sentencing hearing to determine if a term of imprisonment for life or a term of years equal to life imprisonment is an appropriate sentence.

(2) In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:

(a) The nature and circumstances of the offense committed by the defendant.

(b) The effect of the crime on the victim's family and on the community.

(c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.

(d) The defendant's background, including his or her family, home, and community environment.

(e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.

(f) The extent of the defendant's participation in the offense.

(g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.

(h) The nature and extent of the defendant's prior criminal history.

(i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.

(j) The possibility of rehabilitating the defendant.

Appendix D

921.1402 Review of sentences for persons convicted of specified offenses committed while under the age of 18 years.—

(1) For purposes of this section, the term "juvenile offender" means a person sentenced to imprisonment in the custody of the Department of Corrections for an offense committed on or after July 1, 2014, and committed before he or she attained 18 years of age.

(2)(a) A juvenile offender sentenced under s. 775.082(1)(b)1. is entitled to a review of his or her sentence after 25 years. However, a juvenile offender is not entitled to review if he or she has previously been convicted of one of the following offenses, or conspiracy to commit one of the following offenses, if the offense for which the person was previously convicted was part of a separate criminal transaction or episode than that which resulted in the sentence under s. 775.082(1)(b)1.:

1. Murder;

2. Manslaughter;

3. Sexual battery;

4. Armed burglary;

5. Armed robbery;

6. Armed carjacking;

7. Home-invasion robbery;

8. Human trafficking for commercial sexual activity with a child under 18 years of age;

9. False imprisonment under s. 787.02(3)(a); or

10. Kidnapping.

(b) A juvenile offender sentenced to a term of more than 25 years under s. 775.082(3)(a)5.a. or s. 775.082(3)(b)2.a. is entitled to a review of his or her sentence after 25 years.

(c) A juvenile offender sentenced to a term of more than 15 years under s. 775.082(1)(b)2., s. 775.082(3)(a)5.b., or s. 775.082(3)(b)2.b. is entitled to a review of his or her sentence after 15 years.

(d) A juvenile offender sentenced to a term of 20 years or more under s. 775.082(3)(c) is entitled to a review of his or her sentence after 20 years. If the juvenile offender is not resentenced at the initial review hearing, he or she is eligible for one subsequent review hearing 10 years after the initial review hearing.

(3) The Department of Corrections shall notify a juvenile offender of his or her eligibility to request a sentence review hearing 18 months before the juvenile offender is entitled to a sentence review hearing under this section.

(4) A juvenile offender seeking sentence review pursuant to subsection (2) must submit an application to the court of original jurisdiction requesting that a sentence review hearing be held. The juvenile offender must submit a new application to the court of original jurisdiction to request subsequent sentence review hearings pursuant to paragraph (2)(d). The sentencing court shall retain original jurisdiction for the duration of the sentence for this purpose.

(5) A juvenile offender who is eligible for a sentence review hearing under this section is entitled to be represented by counsel, and the court shall appoint a public defender to represent the juvenile offender if the juvenile offender cannot afford an attorney.

(6) Upon receiving an application from an eligible juvenile offender, the court of original sentencing jurisdiction shall hold a sentence review hearing to determine whether the juvenile offender's sentence should be modified. When determining if it is appropriate to modify the juvenile offender's sentence, the court shall consider any factor it deems appropriate, including all of the following:

(a) Whether the juvenile offender demonstrates maturity and rehabilitation.

(b) Whether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing.

(c) The opinion of the victim or the victim's next of kin. The absence of the victim or the victim's next of kin from the sentence review hearing may not be a factor in the determination of the court under this section. The court shall permit the victim or victim's next of kin to be heard, in person, in writing, or by electronic means. If the victim or the victim's next of kin chooses not to participate in the hearing, the court may consider previous statements made by the victim or the victim's next of kin during the trial, initial sentencing phase, or subsequent sentencing review hearings.

(d) Whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person.

(e) Whether the juvenile offender has shown sincere and sustained remorse for the criminal offense.

(f) Whether the juvenile offender's age, maturity, and psychological development at the time of the offense affected his or her behavior.

(g) Whether the juvenile offender has successfully obtained a high school equivalency diploma or completed another educational, technical, work, vocational, or self-rehabilitation program, if such a program is available.

(h) Whether the juvenile offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense.

(i) The results of any mental health assessment, risk assessment, or evaluation of the juvenile offender as to rehabilitation.

(7) If the court determines at a sentence review hearing that the juvenile offender has been rehabilitated and is reasonably believed to be fit to reenter society, the court shall modify the sentence and impose a term of probation of at least 5 years. If the court determines that the juvenile offender has not demonstrated rehabilitation or is not fit to reenter society, the court shall issue a written order stating the reasons why the sentence is not being modified.