

APPLICATION FOR NOMINATION TO THE  
FLORIDA SUPREME COURT



JOSHUA AARON MIZE

# APPLICATION FOR NOMINATION TO THE FLORIDA SUPREME COURT

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

**Full Name:** Joshua Aaron Mize

**Social Security No.:** [REDACTED]

**Florida Bar No.:** 86163

**Date Admitted to Practice in Florida:** 10/5/2010

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.

District Judge  
Florida Sixth District Court of Appeal  
811 East Main Street  
Lakeland, FL 33801  
863-274-9754

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.

I have resided at [REDACTED] since November 28, 2020.

I have lived in Florida for the past 29 years, except for the period of July 2015 through February 16, 2018 when I lived in Virginia.

My cell phone number is [REDACTED]. My email address is [REDACTED].

3. State your birthdate and place of birth. [REDACTED], [REDACTED]
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.

See Exhibit A hereto. I have never been suspended or resigned from any bar or court. My bar admissions in Virginia, West Virginia, Texas, Colorado and the District of Columbia are each currently on a non-active status. I changed my status in these jurisdictions after I became a judge because I no longer have a need to maintain an active status in these jurisdictions. Some of my

federal court admissions may have lapsed since I became a judge due to my declining to renew the admissions since I became a judge.

6. Have you ever been known by any aliases? If so, please indicate and when you were known by such alias. No.

**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).

<u>School</u>	<u>Dates of Attendance</u>	<u>Degree Received</u>	<u>Graduation Date</u>	<u>Class Standing</u>	<u>GPA</u>
University of Florida College of Law	Aug. 2007 - May 2010	J.D., <i>magna cum laude</i>	5/14/2010	5/349	3.82
University of Florida	Aug. 2003 - May 2007	B.A., <i>cum laude</i>	5/5/2007	Not Available	3.53
University of Florida	Aug. 2003 - May 2007	B.S.B.A.	5/5/2007	Not Available	3.53

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.

President, UF Federalist Society, Fall 2008 – Spring 2010

Grade-on Member, *Florida Law Review*

Articles Editor, Spring 2009

Notes & Comments Editor, Fall 2009 – Spring 2010

Order of the Coif, University of Florida College of Law Chapter, Inducted Spring 2010

Board Member, Law College Council, Spring 2008 – Spring 2010

Member, Law School Republicans, 2007 – 2010

Member, College Republicans, 2003 – 2007

Member, Golden Key International Honor Society, Inducted Fall 2006

**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.

<u>Title</u>	<u>Employer</u>	<u>Address</u>	<u>Dates</u>
District Judge	Florida Sixth District Court of Appeal	811 E. Main St. Lakeland, FL 33801	1/1/2023 – Present
Circuit Judge	Ninth Circuit Court of Florida	425 N. Orange Ave. Orlando, FL 32801	2/22/2021 – 12/31/2022
Owner	Mize Law, PLLC	941 W. Morse Blvd. Suite 100 Winter Park, FL 32789	02/16/2018 – 2/7/2021
Associate Attorney	Morris, Manning & Martin, LLP	1401 I Street N.W. Suite 600 Washington, D.C. 20005	11/30/2015 – 02/16/2018
Associate Attorney	Akerman LLP	420 South Orange Ave. Suite 1200 Orlando, FL 32801	04/16/2012 – 11/25/2015
Associate Attorney	Bush Ross, P.A.	1801 N. Highland Ave. Tampa, FL 33602	10/05/2010 – 04/13/2012
Summer Associate	Bush Ross, P.A.	1801 N. Highland Ave. Tampa, FL 33602	Summer 2009

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

I am currently a District Judge on the Florida Sixth District Court of Appeal. In that role, I hear all manner of appeals and original proceedings that are filed in the District Court, including criminal, civil, family, juvenile and probate appeals, as well as petitions for extraordinary writs, such as petitions for writ of certiorari, writ of habeas corpus, writ of mandamus and writ of prohibition. Since becoming a District Judge, I have also occasionally sat by designation as a Circuit Judge, including presiding over one criminal felony jury trial, one civil jury trial, and one multi-day evidentiary hearing on a motion to suppress in a criminal felony division.

Prior to my appointment to the District Court, I served as a Circuit Judge on the Ninth Circuit Court of Florida in the Domestic Relations Division from February 22, 2021 through December 31, 2022. In that role, I presided over cases related to marriage, children, and families,

including but not limited to dissolution of marriage cases, paternity cases, adoption cases, and temporary custody proceedings.

As a Circuit Judge, I presided over more than 40 family law trials, as well as countless evidentiary hearings. The proceedings over which I presided involved complex issues such as disputes involving The Hague Convention, issues of foreign law and the effect of foreign legal proceedings and foreign administrative actions in the State of Florida, medical conditions and disabilities, and discovery disputes concerning foreign assets and entities, complex business arrangements, cryptocurrency, trusts, and construction projects. I also conducted interstate family law proceedings with courts in California, Georgia, New Jersey and South Dakota.

While on the Circuit Court, in addition to my service in the Domestic Relations Division, I periodically presided over proceedings in the Circuit Civil, Circuit Criminal and County Criminal Divisions. In the Circuit Civil Division, I presided over hearings on discovery motions, motions to dismiss, a motion for contempt, and a motion for summary judgment. In the Circuit Criminal Division, I presided over a three-day criminal jury trial. In the County Criminal Division, I presided over hearings on motions to suppress evidence, motions in limine, plea hearings, and other motion hearings. I also conducted Initial Appearances at the Orange County Booking & Release Center as well as the Juvenile Justice Center. I also reviewed applications for warrants from law enforcement agencies and ruled upon the granting or denial of such applications.

Before I became a judge, my practice consisted of commercial, intellectual property, consumer protection and other civil litigation for businesses and individuals. I conducted numerous evidentiary proceedings in federal and state courts as first chair. My clients included individuals, small businesses and large companies seeking representation for contract disputes, tort claims, intellectual property disputes, consumer protection matters and other civil litigation matters. In the course of my practice, I litigated complex commercial cases involving highly technical subject matter. I also led multiple large electronic discovery projects requiring supervision of attorneys, paralegals, legal secretaries and outside vendors. The significant cases I litigated as an attorney included:

- Served as lead counsel for national corporations and individual consumers in numerous lawsuits brought under federal and state consumer protection laws, including the Telephone Consumer Protection Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act and the Florida Consumer Collection Practices Act
- Represented individual in appeal of adverse judgment in breach of contract action involving an international cross-border sale of artwork valued in excess of \$4 million
- Represented national retailer defending appeal of judgment dismissing with prejudice claims against retailer for false advertising and fraud
- Represented multinational medical device manufacturer in constitutional challenge to bond validation proceeding initiated in Collier County, Florida
- Represented developer in dispute with general contractor regarding \$25 million construction contract for multifamily housing financed by HUD-insured loan

- Represented international developer of multifamily housing in dispute with mezzanine lender involving eleven multifamily properties valued at more than \$250 million
- Represented corporate landowner in defense of breach of lease action with alleged damages in excess of \$20 million
- Represented software company in defense of complex litigation involving business torts and claims for copyright infringement based on misappropriation of software code
- Represented American Automobile Association in trademark infringement action
- Represented large for-profit university in defense of breach of contract action brought by former provider of student housing
- Represented national retailer in racial discrimination action under 42 U.S.C. § 1981
- Represented provider of election law compliance services in action brought by competitor asserting claims for business defamation and tortious interference
- Represented NASA contractor in defense of parallel federal and state actions against competing NASA contractor involving claims for copyright infringement and misappropriation of trade secrets based on alleged misappropriation of software code
- Represented international battery manufacturer in trademark infringement action against major national retail chain and competing manufacturer
- Represented national insurance company in defense of suit involving complex fraud and business tort claims brought by former principal of regional insurance agency
- Represented European manufacturer of packaged goods in defense of breach of contract action brought by alleged former sales representative for the United States
- Represented national social media services company in trademark infringement action
- Represented manufacturer of components of vintage motorcycles in breach of contract action against former company principal

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	<u>100</u> %
Federal Trial	<u>50</u> %		Criminal	_____ %
Federal Other	_____ %		Family	_____ %
State Appellate	<u>2</u> %		Probate	_____ %
State Trial	<u>48</u> %		Other	_____ %
State Administrative	_____ %			
State Other	_____ %			
<b>TOTAL</b>	<u>100</u> %		<b>TOTAL</b>	<u>100</u> %

The foregoing percentages are based on the last five years that I practiced law, which was February 2016 – February 2021.

If your appearance in court the last five years is substantially different from your prior practice, please provide a brief explanation: N/A

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

Jury?	<u>1</u>	Non-jury?	<u>1</u>
Arbitration?	_____	Administrative Bodies?	_____
Appellate?	<u>1</u>		

These are cases that I litigated as an attorney prior to becoming a judge. The jury trial was a three-day jury trial in federal court. I personally conducted the entirety of the trial. The non-jury trial was a three-day trial in Florida state court. I was second chair for two days of the three-day bench trial, during which I examined witnesses. The appeal was an appeal from a Florida county court to a circuit court. I personally handled the entirety of the appeal. I also handled an appeal in the U.S. Court of Appeals for the Second Circuit, including drafting the Appellant’s Initial Brief, but the case settled before the Court issued a decision. I have also conducted many other non-trial evidentiary proceedings as first chair.

As stated above, as a Circuit Judge, I presided over more than 40 non-jury trials and one jury trial. Since becoming a District Judge, I have presided over two jury trials sitting by designation as a Circuit Judge.

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

*Richard Green (Fine Paintings) v. Mary Alice McClendon*, Case No. 10-4845

Court: U.S. Court of Appeals for the Second Circuit

Co-counsel: Carter Andersen, [REDACTED]

Opposing counsel: John R. Cahill, [REDACTED]

Description: I was responsible for all aspects of the appeal, including examination of the entire trial court record and drafting of the Appellant’s Initial Brief. I examined the appellate court’s jurisdiction, the trial court’s subject matter jurisdiction, the applicable standards of review and the substantive legal issues. Ultimately, the case settled before the Court ruled on the appeal. In addition to this case, I have handled an appeal from a Florida county court to a circuit court.

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.*

***Erik Larsen v. AR Resources, Inc.***

Case No. 4:19-cv-00041-RBS-DEM

Court: U.S. District Court for the Eastern District of Virginia

Opposing Counsel: Randall Lenhart,

Kevin Cornish,

***Brevard Land Materials, Inc. v. Boruch-David, LLC***

Case No. 05-2013-CA-025901

Court: Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida

Co-counsel: Todd Pittenger,

Opposing counsel: Charles M. Greene,

Richard Reinhart,

***Truthinadvertisingenforcers.com (Gerald Collette) v. Zale Delaware, Inc.***

Case No. 2017-AP-000029

Court: Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida

Opposing counsel: N/A. Appellant was *pro se*.

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.*

***Jacqueline K. Armour v. Synchrony Bank***

Case No. 20-SC-3419

Court: County Court of the Fifth Judicial Circuit in and for Marion County, Florida

Opposing counsel: Francis Rodriguez, [REDACTED]

***Rosa Tierney v. Credit Corp. Solutions, Inc.***

Case No. 0:20-cv-62366-KMM

Court: U.S. District Court for the Southern District of Florida

Opposing counsel: Seth P. Robert, [REDACTED]

***Brenda A. Ramos v. Capital One, N.A. & Kohl's, Inc.***

Case No. 05-2020-SC-038780

Court: County Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida

Opposing counsel: Ellen T. Matthews, [REDACTED]

***Kozette Malay v. Virtuoso Sourcing Group, LLC***

Case No. 2:20-CV-00635

Court: U.S. District Court for the Southern District of West Virginia

Opposing counsel: Nicholas P. Mooney, [REDACTED]

***Paola Carrion v. BMW Financial Services NA, LLC***

Case No. 50-2020-SC-015905-XXXX-NB

Court: County Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

Opposing counsel: Ryan L. DiClemente, [REDACTED]

***Haley Dulanski v. Credit One Bank, N.A.***

Case No. 2019SC-002225-0000-WH

Court: County Court of the Tenth Judicial Circuit in and for Polk County, Florida

Opposing counsel: Alexandra de Alejo, [REDACTED]

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.

As a District Judge, I typically participate in oral arguments one to two days per month.

During my service as a Circuit Judge from February 22, 2021 through December 31, 2022, I typically presided in Court Monday through Friday each week.

During my last five years as an attorney, I appeared in Court approximately once per month on average. I did not appear at any administrative hearings.

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

N/A

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

My practice did not involve personal injury, workers' compensation or professional malpractice.

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.

**1. *Erik Larsen v. AR Resources, Inc.***

Case No. 4:19-cv-00041-RBS-DEM

Court: U.S. District Court for the Eastern District of Virginia, Norfolk Division

Judge: Hon. Rebecca Beach Smith

Client: Erik Larsen

Nature of Participation: Counsel for Erik Larsen

Dates of Case: April 2019 – June 2020

Opposing Counsel: Randall Lenhart, [REDACTED]  
Kevin Cornish, [REDACTED]

Significance: This case is significant because it shows my ability to adeptly handle all phases of litigation. I was the sole attorney for the Plaintiff from the filing of the Complaint through the three-day jury trial and post-trial motions. I prepared all pleadings, conducted all written discovery, deposed all witnesses, prepared the successful response to the Defendant's Motion for Summary Judgment, performed all pretrial preparation, drafted all proposed jury instructions, conducted the three-day jury trial and prepared responses to the Defendant's post-trial motions. The jury returned a verdict for the Plaintiff. I prepared a Motion for Attorneys' Fees, which resulted in the Court entering a judgment for attorneys' fees in my favor. The Defendant filed a post-trial Motion for Judgment as a Matter of Law and a Request for New Trial, and I drafted the Response. The District Judge denied the Defendant's motion.

**2. *Housing and Residence Life, LLC v. Universal Technical Institute of Phoenix, Inc.***

Case No. 6:12-cv-00874

Court: U.S. District Court for the Middle District of Florida, Orlando Division

Judge: Hon. John Antoon, II

Client: Universal Technical Institute, Inc. (“UTI”)

Nature of Participation: Co-counsel for UTI

Dates of Case: June 2012 – September 2013

Co-counsel: Todd Pittenger, [REDACTED]

Opposing Counsel: David S. Cohen, [REDACTED]  
Shawn L. Demers, [REDACTED]

Significance: This case is significant for the excellent results obtained, the technical nature of the discovery, and the sensitive matters at issue. This case shows my legal acumen, my ability to handle complex discovery, and my judgment in handling matters of a sensitive nature.

UTI is a nationwide provider of technical education training that operates eleven campuses, including one in Orlando. UTI engaged Housing & Residence Life, LLC (“HRL”) as a provider of dormitory style housing for UTI’s Orlando campus. UTI subsequently engaged a separate provider of apartment style housing. UTI also terminated the agreement with HRL due to HRL’s failure to maintain the dormitory style housing in a safe and satisfactory condition. HRL brought suit against UTI for breach of the parties’ contract. I conducted discovery concerning lost profits and other damages, construction defects, health and safety hazards, sensitive issues of criminal activity, and complex statistical survey evidence relating to student satisfaction levels. I deposed the Plaintiff’s expert witness and both of the Plaintiff’s principles. I ultimately drafted a successful Motion to Dismiss, a Daubert Motion, a Motion in Limine, and the Motion for Summary Judgment. After the Court entered an Order granting the Motion for Summary Judgment in part and denying the vast majority of the Plaintiff’s alleged damages, the case settled shortly before the start of trial. The Court’s Order granting the Motion for Summary Judgment in part can be found at *Hous. & Residence Life, LLC v. Universal Tech. Inst. of Phoenix, Inc.*, No. 6:12-CV-874-ORL-28, 2013 WL 4506395 (M.D. Fla. Aug. 23, 2013).

### **3. *Brevard Land Materials, Inc. v. Boruch-David, LLC***

Case No. 05-2013-CA-025901

Court: Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida

Judge: Hon. Lisa Davidson

Client: Boruch-David, LLC (“Boruch-David”)

Nature of Participation: Co-counsel for Boruch-David

Dates of Case: I was co-counsel for Boruch-David from July 2013 through Nov. 2015

Co-counsel: Todd Pittenger, [REDACTED]  
Kelly Garcia, [REDACTED]

Opposing Counsel: Charles M. Greene, [REDACTED]  
Richard Reinhart, [REDACTED]

Significance: This was one of the most unique and complex cases in which I was involved as an attorney. It was one of multiple lawsuits in a dispute that was litigated in both federal and state courts with multiple appeals taken. I was co-counsel for Boruch-David from July 2013 through November 2015.

In April 2013, Brevard Land Materials, Inc. (“Brevard Land”) filed a Complaint against Boruch-David alleging that Boruch-David breached a Borrow Pit Lease/Operating Agreement that gave Brevard Land the right to excavate fill dirt from a 150-acre Borrow Pit owned by Boruch-David. The agreement was executed in 2002. Brevard Land alleged that in early 2013, Boruch-David barred Brevard Land from the Borrow Pit despite the fact that Brevard Land had not yet excavated the total amount of dirt that Brevard Land was entitled to excavate from the pit. Boruch-David denied the substantive allegations in Brevard Land’s Complaint.

In addition to denying the substantive allegations made by Brevard Land, Boruch-David also asserted that the purported owner of Brevard Land, Donovan Davis, was actually no longer the owner of Brevard Land and that, therefore, he did not have the right to direct Brevard Land to bring claims against Boruch-David. Specifically, in 2009, Donovan Davis had previously been a defendant in a civil fraud action brought against him by the Commodity Futures Trading Commission in the Middle District of Florida (Case No. 6:09-cv-00508). The civil fraud action related to a foreign currency trading firm called Capital Blu Management, LLC, of which Donovan Davis was the manager and owner. In that action, the MDFL entered a preliminary injunction against Mr. Davis creating a receivership estate consisting of essentially all property of Mr. Davis. The receivership estate was intended to repay the victims of Mr. Davis’ fraud. Mr. Davis failed to disclose the existence of Brevard Land to the receiver. As a result, the receiver took no action with respect to Brevard Land. The receiver was discharged and the receivership estate was closed in 2010.

In *Brevard Land v. Boruch-David*, Boruch-David asserted that because all property of Donovan Davis had been placed into a receivership estate in the Middle District of Florida and had never been released from the receivership estate, the entity Brevard Land remained in the custody of the U.S. District Court for the Middle District of Florida. As a result, Mr. Davis did not have authority to direct the actions of Brevard Land and, specifically, did not have authority to direct Brevard Land to bring legal claims against Boruch-David. Mr. Davis disputed that Brevard Land was in the custody of the federal court. Judge Lisa Davidson ultimately bifurcated this issue and conducted a three-day bench trial solely on this issue. I acted as second chair for two days of the trial, including examining witnesses. After the trial, Judge Davidson ruled in favor of Boruch-David and found that Brevard Land remained in the custody of the federal court. The ruling was upheld by the Fifth District Court of Appeal. I left Akerman in November 2015 and my involvement in the case ended at that time. Subsequently, permission was requested from the Middle District of Florida in order to assert claims on behalf of Brevard Land and the litigation continued.

***4. Cynthia J. Selton, et al. v. U.S. Bank Trust National Association, S.D., et al.***

Case No. 6:14-cv-01278-RBD-KRS

Court: U.S. District Court for the Middle District of Florida, Orlando Division

Judge: Hon. Roy B. Dalton

Clients: Richard Ihrig, Lindquist & Vennum, P.L.L.P and Gina J. Paulucci

Nature of Participation: Co-counsel for the three listed clients

Dates of Case: August 2014 – August 2015

Co-counsel: Virginia Townes, [REDACTED]

Opposing Counsel: Anthony W. Palma, [REDACTED]  
Todd K. Norman, [REDACTED]  
Joseph Frein, [REDACTED]

Counsel for Co-Defendants: T. Robert Bulloch, [REDACTED]  
Keely Morton, [REDACTED]  
Keith Hesse, [REDACTED]

Significance: This case shows my ability to understand complex jurisdictional issues. This case involved a trust with connections to three states: Minnesota, South Dakota and Florida. Two contingent beneficiaries of the trust filed a Complaint against the trustees and the primary beneficiary of the trust. The Complaint alleged that the trustees improperly changed the situs of the trust from Florida to South Dakota, which reduced the rights of the contingent beneficiaries. It was undisputed that a South Dakota court had previously entered a final judgment confirming that the situs of the trust was in South Dakota and that the trust was subject to supervision by the South Dakota court. The Plaintiffs sought a declaration that the change of situs was null and void and that the situs of the trust remained in Florida. The Plaintiffs also sought removal of the trustees, to avoid certain payments made from the trust to the trustees, and an award of damages from the trustees.

I was the primary drafter of the Defendants' Motion to Dismiss which argued that the Court lacked subject matter jurisdiction to hear the case based on a 1939 case from the U.S. Supreme Court, *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939). In that case, the Supreme Court held that a state court's exercise of jurisdiction over the administration of a trust deprives a federal court of subject matter jurisdiction over a later lawsuit brought by the beneficiaries of the trust asserting claims against the trustees for mismanagement of the trust. The Motion to Dismiss argued that the Plaintiffs' claims, including their claims for money damages and claims to remove the trustees, were *quasi in rem* claims that actually pertained to management of the trust and its corpus and that, therefore, the claims were subject to the *Princess Lida* Doctrine and the MDFL lacked jurisdiction. In the alternative, the Motion to Dismiss argued that certain of the Plaintiffs' claims were barred by the Full Faith & Credit clause of the U.S. Constitution, that the Court lacked personal jurisdiction over the Defendants, and that the Plaintiffs' Complaint failed to state a cause of action.

This case concerned very nuanced issues pertaining to jurisdiction. The Plaintiffs asserted that their claims were *in personam* and disputed that the *Princess Lida* Doctrine applied. After extensive briefing, the Court agreed that the Plaintiffs' claims were *quasi in rem* and that, therefore, the *Princess Lida* Doctrine applied and mandated that the Court dismiss the Plaintiffs' claims. The decision is reported at *Selton v. U.S. Bank Trust Nat. Assn.*, 124 F.Supp.3d 1245 (M.D. Fla. 2015).

**5. *Fabian Wade v. Kay Jewelers Inc., et al.***

Case No. 3:17-cv-990-MPS

Court: U.S. District Court for the District of Connecticut, New Haven Division

Judge: Hon. Michael P. Shea

Client: Sterling Jewelers, Inc.

Nature of Participation: Lead counsel for Sterling Jewelers Inc.

Dates of Case: May 2017 – May 2019

Co-counsel: Daniel I. Prywes,  
Colleen J. Vellturo,  
Stephen P. Brown,  
Janice D. Lai,

Opposing Counsel: Nitor V. Egbarin,

Counsel for Co-Defendant: Dawn Neborsky,

Counsel for

Third-Party Defendant:

Lorinda S. Coon,  
Richard A. Roberts,  
Robert G. Clemente,

Significance: This case is significant because it shows my understanding of the challenges faced by solo and small law firm practitioners, who make up a majority of the members of The Florida Bar. The Plaintiff in this case filed suit against two defendants asserting claims for violation of 42 U.S.C. § 1981, along with five state law tort claims. I began as lead counsel for one of the defendants, Sterling Jewelers Inc. (“Sterling Jewelers”), while I was practicing at Morris, Manning & Martin, LLP (“MMM”) in Washington, D.C. The case lasted approximately two years. Nine months into the case, in February 2018, I left MMM to start my own law firm in Florida. Sterling Jewelers chose to retain me as lead counsel. I handled this significant out of state litigation while also starting and running a new law firm with no other attorneys or staff. I conducted six out-of-state depositions requiring two trips out of state that all occurred while my new law firm was in its infancy. While running this litigation, I had to simultaneously handle all of the client and managerial responsibilities that come with starting and running a new law firm, including handling all matters for my other clients without sacrificing service to any client, missing any court deadlines or failing to meet any other professional responsibility. My personal experience overcoming the challenges of starting and running a small law firm while handling significant litigation will assist me as a member of the body that governs the members of The Florida Bar, a majority of whom practice in small law firms.

I ultimately achieved a successful result for my client in this case. I was the sole author of Sterling Jewelers’ Second Motion for Summary Judgment, which the Court granted in full. The Court’s order granting that motion is available at *Wade v. Kay Jewelers, Inc.*, 3:17-CV-990 (MPS), 2019 WL 1396179 (D. Conn. Mar. 27, 2019).

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 the following:

- (1) *Lightsey Cattle Co. v. Fla. Fish and Wildlife Conserv. Comm.*, 413 So. 3d 182 (Fla. 6th DCA 2024)
- (2) *Gonzalez v. State*, 412 So. 3d 829 (Fla. 6th DCA 2024) (Mize, J., concurring)
- (3) *Armstrong v. State*, 395 So. 3d 1127 (Fla. 6th DCA 2024) (Mize, J., concurring)

I personally wrote each of these opinions. As with all appellate opinions, I may have received input from other judges on the court.

### **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 DeSantis appointed me to the Florida Sixth District Court of Appeal for a term that began on January 1, 2023. I stood for retention election in 2024 and was successfully retained for a six-year term that began on January 7, 2025. I currently serve in this position.

Prior to my appointment to the District Court, Governor DeSantis appointed me to fill a vacancy on the Circuit Court of the Ninth Judicial Circuit. I served in that position from February 22, 2021 through December 31, 2022. I stood for election for a full term to the Circuit Court in 2022. At the close of qualifying on April 29, 2022, I was unopposed and, as a result, I was elected without opposition to a full six-year term.

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 applied to the Ninth Circuit Judicial Nominating Commission in September 2018 and the Fifteenth Circuit Judicial Nominating Commission in July 2019. Neither commission certified my name to the Governor's office for consideration.

I applied to the Ninth Circuit Judicial Nominating Commission in January 2021 and the Commission certified my name to the Governor's office for consideration. The Governor appointed me to this vacancy.

I applied to the Fifth District Court of Appeal Judicial Nominating Commission in January 2021. I withdrew my name from consideration prior to the commission certifying names to the Governor due to my appointment to the Circuit Court of the Ninth Judicial Circuit.

I applied to the Sixth District Court of Appeal Judicial Nominating Commission in September 2022 and the Commission certified my name to the Governor's office for consideration. The Governor appointed me to this vacancy.

I applied to the Florida Supreme Court Judicial Nominating Commission in April 2023 and the Commission certified my name to the Governor's office for consideration.

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

N/A

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

- (i) the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance;

John H. Pelzer, Esq.  
Greenspoon Marder LLP  
200 E. Broward Blvd. Ste. 1800  
Fort Lauderdale, FL 33301



Hon. Juna M. Pulayya  
Ninth Circuit Court of Florida  
425 N. Orange Ave.  
Orlando, FL 32801



Keersten Heskin Martinez, Esq.  
Heskin Martinez Law Group  
390 N. Orange Ave., Ste. 1550  
Orlando, FL 32801



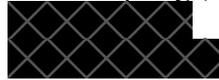
Nicole Park, Esq.  
DownsAaron PLLC  
200 S. Orange Ave. Ste 2250  
Orlando, FL 32801



Mark O'Mara, Esq.  
O'Mara Law Group  
221 N.E. Ivanhoe Blvd., Ste. 200  
Orlando, FL 32804



Debra L. Ferwerda, Esq.  
Jacobson, Chmelir and Ferwerda  
351 E. State Road 434, Ste. A  
Winter Springs, FL 32708



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

On the Sixth District Court of Appeal, I handle all manner of appeals and original proceedings that are filed in the District Court, including criminal, civil, family, juvenile and probate appeals, as well as petitions for extraordinary writs, such as petitions for writ of certiorari, writ of habeas corpus, writ of mandamus and writ of prohibition. During my time on the District Court, I have served on panels that adjudicated 1,002 appeals and countless petitions for extraordinary writs. 174 of those cases resulted in written opinions. Of the cases that resulted in written opinions, forty-four of the majority opinions were authored by me and 130 were opinions authored by another judge or that were issued per curiam. As noted above, since I became a District Judge, I have also sat by designation as a Circuit Judge and presided over two jury trials.

During my service as a Circuit Judge from February 22, 2021 through December 31, 2022, between 2,500-2,750 family law cases were typically assigned to my division at any given time. The vast majority of cases are settled by the parties without trial, although many cases that resolve without trial require substantial evidentiary proceedings and discovery hearings before the parties reach a settlement. I presided over more than 40 non-jury trials and countless evidentiary hearings in family law proceedings. I also presided over one criminal jury trial.

(iii) the citations of any published opinions; and

1. *Smith v. State*, 415 So. 3d 278 (Fla. 6th DCA 2025)
2. *Ortiz v. State*, 416 So. 3d 413 (Fla. 6th DCA 2025)
3. *Thorpe v. Mem'l Sloan-Kettering Cancer Ctr.*, 412 So. 3d 861 (Fla. 6th DCA 2025)
4. *Upland Ventures, Inc. v. Diaz-Pichardo*, 419 So. 3d 255, 256 (Fla. 6th DCA 2025)
5. *Middlebrook v. State*, 403 So. 3d 508 (Fla. 6th DCA 2025)
6. *Reina v. Klisivitch*, 419 So. 3d 246, 248 (Fla. 6th DCA 2025)
7. *Fortson v. State*, 417 So. 3d 532 (Fla. 6th DCA 2025)
8. *Hernandez v. State*, 406 So. 3d 1040 (Fla. 6th DCA 2025)
9. *O'Neil v. State*, 401 So. 3d 1235 (Fla. 6th DCA 2025)
10. *Khouleanghak v. State*, 415 So. 3d 843 (Fla. 6th DCA 2025)
11. *Nishad Khan PL v. Regions Bank*, 2025 WL 3181691 (Fla. 6th DCA Nov. 14, 2025)
12. *Raber v. State*, 2025 WL 3039434 (Fla. 6th DCA Oct. 31, 2025)
13. *Caraballo v. State*, 2025 WL 2990240 (Fla. 6th DCA Oct. 24, 2025)
14. *AC & JL Holdings, Inc. v. Levy*, 2025 WL 2552959 (Fla. 6th DCA Sept. 5, 2025)
15. *Sch. Bd. of Polk Cnty. v. Keys Claims Consultants, LLC*, 2025 WL 1132011 (Fla. 6th DCA Apr. 17, 2025)
16. *Gutierrez v. Sec. First Ins. Co.*, 2025 WL 938484 (Fla. 6th DCA Mar. 28, 2025)
17. *Lightsey Cattle Co. v. Fla. Fish and Wildlife Conserv. Comm.*, 413 So. 3d 182 (Fla. 6th DCA 2024)
18. *Julia v. Ramos-Baez*, 395 So. 3d 1121 (Fla. 6th DCA 2024)
19. *Armstrong v. State*, 395 So. 3d 1127 (Fla. 6th DCA 2024) (Mize, J., concurring)

20. *Hargrove v. State*, 412 So. 3d 817 (Fla. 6th DCA 2024)
21. *Gonzalez v. State*, 412 So. 3d 829 (Fla. 6th DCA 2024) (Mize, J., concurring)
22. *Irizarry v. State*, 381 So. 3d 1274 (Fla. 6th DCA 2024)
23. *MacPherson v. MacPherson*, 387 So. 3d 418 (Fla. 6th DCA 2024)
24. *Bean v. State*, 388 So. 3d 300 (Fla. 6th DCA 2024)
25. *Gunsby v. Mackey*, 395 So. 3d 655 (Fla. 6th DCA 2024)
26. *Lai v. State*, 397 So. 3d 208 (Fla. 6th DCA 2024)
27. *Nealy v. State*, 397 So. 3d 649 (Fla. 6th DCA 2024)
28. *Forrey v. Marlin Constr. Group, LLC*, 412 So. 3d 852 (Fla. 6th DCA 2024)
29. *Sulzer v. Am. Integrity Ins. Co. of Florida*, 418 So. 3d 674 (Fla. 6th DCA 2024) (Mize, J., concurring)
30. *Florida BC Holdings, LLC v. Reese*, 376 So. 3d 109 (Fla. 6th DCA 2023)
31. *Smith v. Lyles*, 364 So. 3d 1123 (Fla. 6th DCA 2023)
32. *Powell v. State*, 368 So. 3d 539 (Fla. 6th DCA 2023)
33. *Costello v. Olson*, 379 So. 3d 536 (Fla. 6th DCA 2023)
34. *Raducan v. State*, 363 So. 3d 227 (Fla. 6th DCA 2023)
35. *Dubois v. State*, 363 So. 3d 346 (Fla. 6th DCA 2023)
36. *Gonzalez v. State*, 369 So. 3d 368 (Fla. 6th DCA 2023)
37. *Summerson v. State*, 374 So. 3d 898 (Fla. 6th DCA 2023)
38. *Edmonds v. Edmonds*, 363 So. 3d 213 (Fla. 6th DCA 2023)
39. *Gayer v. Nicita*, 368 So. 3d 533 (Fla. 6th DCA 2023)
40. *Jean v. State*, 369 So. 3d 1235 (Fla. 6th DCA 2023)
41. *Goodman v. Goodman*, 363 So. 3d 220 (Fla. 6th DCA 2023)
42. *Maki v. NCP Bayou 2, LLC*, 368 So. 3d 1081 (Fla. 6th DCA 2023)
43. *Young v. State*, 369 So. 3d 1243 (Fla. 6th DCA 2023)
44. *Reese v. Reese*, 363 So. 3d 1202 (Fla. 6th DCA 2023)
45. *Baute v. Crenshaw*, 405 So. 3d 388 (Fla. 6th DCA 2023)
46. *Bensen v. Privilege Underwriters Reciprocal Exch.*, 401 So. 3d 390 (Fla. 6th DCA 2023)
47. *Lax v. Marceno*, 405 So. 3d 380 (Fla. 6th DCA 2023)
48. *People's Tr. Ins. Co. v. Gunsser*, 373 So. 3d 422 (Fla. 6th DCA 2023) (Mize, J., concurring)

(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.

**(1) *Lightsey Cattle Co. v. Fla. Fish and Wildlife Conserv. Comm.*, 413 So. 3d 182 (Fla. 6th DCA 2024)**

Date of Opinion: July 12, 2024

Counsel for Appellant: Michael Raiden, [REDACTED]

Counsel for Appellee: Bridget McDonnell, [REDACTED]

Nature of Case: Administrative Law Appeal

Description: This case is significant because it demonstrates my ability to adjudicate complex constitutional and jurisdictional issues, as well as my fluency in administrative law and the common law. As stated in the opinion, neither party to this appeal challenged our court's jurisdiction over the appeal. Nonetheless, our court had an independent obligation to examine its own jurisdiction. Upon conducting that examination, we determined that Article V, Section 4(b)(2) of the Florida Constitution, which establishes the jurisdiction of district courts of appeal to review the action of administrative agencies by direct appeal, and Florida's Administrative Procedure Act, did not grant our court jurisdiction over the appeal because the appeal concerned the Florida Fish and Wildlife Conservation Commission's exercise of constitutional authority rather than statutory authority. We then determined that the Appellant's proper remedy was to seek review of the Commission's action by common law writ of certiorari in circuit court.

**(2) *Florida BC Holdings, LLC v. Reese*, 376 So. 3d 109 (Fla. 6th DCA 2023)**

Date of Opinion: December 21, 2023

Counsel for Appellant: Michael Fox Orr, [REDACTED]

Counsel for Appellee: Scott C. Adams, [REDACTED]

Nature of Case: Civil Appeal

Description: This case is significant because it demonstrates my ability to adjudicate complex common law issues. This case concerned whether the "impact rule" generally applies to intentional torts and, if so, whether it applies to the tort of intentional interference with an advantageous business relationship. As stated in the opinion, this was a difficult question because Florida's jurisprudence concerning the impact rule as it pertains to intentional torts was unclear and, to a certain extent, contradictory. Our opinion held that the impact rule does not apply to intentional torts and that, even if it did, the impact rule still would not apply to the tort of intentional interference with an advantageous business relationship. In addition to making this holding, the opinion certified conflict with an opinion of the First District and also certified two questions to be of great public importance. The Florida Supreme Court accepted jurisdiction of the case and held oral argument on October 8, 2025. The Court has not yet issued an opinion in the case.

**(3) *Thorpe v. Memorial Sloan-Kettering Cancer Center, et al.*, 412 So. 3d 861 (Fla. 6th DCA 2025)**

Date of Opinion: April 17, 2025

Counsel for Appellant: Kara Rockenbach Link, [REDACTED]

Counsel for Appellee: Christopher Brown, [REDACTED]

Nature of Case: Civil Appeal

Description: This case is significant because it demonstrates my ability to faithfully and competently apply textualism to a statute and to adjudicate complex jurisdictional issues. In this opinion, I examined a number of jurisdictional issues under multiple provisions of Florida's Long-

Arm Statute. The opinion ultimately affirmed the trial court’s conclusion that it lacked personal jurisdiction over the defendants. In doing so, the opinion certified conflict with an opinion of the First District concerning the correct interpretation of Section 48.193(1)(a)6.b. of the Long-Arm Statute. The Florida Supreme Court accepted jurisdiction over the certified conflict. The Court has not yet held oral argument or issued an opinion in the case.

**(4) *Hargrove v. State*, 412 So. 3d 817 (Fla. 6th DCA 2024)**

Date of Opinion: April 19, 2024

Counsel for Appellant: Clayton R. Kaeiser, [REDACTED]

Counsel for Appellee: Roberts J. Bradford, [REDACTED]

Nature of Case: Criminal Appeal

Description: This case is significant because it demonstrates my understanding of Fourth Amendment jurisprudence as well as my ability to identify and clarify confusing areas of the law. As stated in the opinion, some Florida district courts of appeals and federal circuit courts had previously articulated the standard for abandonment under Fourth Amendment law in a manner that incorrectly indicated that a defendant’s subjective intent is the primary factor in determining whether the defendant abandoned property for Fourth Amendment purposes, rather than the standard being an objective standard focused on whether the defendant retained an objectively reasonable expectation of privacy in the subject property at the time of the search. My opinion identified this confusing language in Florida and federal jurisprudence and clarified that the standard for whether property has been abandoned for Fourth Amendment purposes is an objective standard.

**(5) *Julia v. Ramos-Baez*, 395 So. 3d 1121 (Fla. 6th DCA)**

Date of Opinion: August 23, 2024

Counsel for Appellant: Mark A. Neumaier, [REDACTED]

Counsel for Appellee: N/A. Appellee was *pro se*.

Nature of Case: Family Law Appeal

Description: This case is significant because it demonstrates my ability to identify longstanding errors in the law, determine their origin, and correct them when appropriate. Four of Florida’s district courts of appeal had erroneously held that the findings a trial court must make to support an award of attorneys’ fees pursuant to *Florida Patient’s Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), must be made in writing and that, therefore, a trial court’s failure to make such written findings in an order awarding attorneys’ fees pursuant to *Rowe* renders the order erroneous on its face and subject to reversal, even without the availability of a transcript of the relevant hearing or trial at which the issue of attorneys’ fees was determined. My opinion traced this error to *Giltex Corp. v. Diehl*, 583 So. 2d 734 (Fla. 1st DCA 1991), a case in which the First District made this holding based on no legal authority whatsoever. After the First District issued its

decision in *Giltex*, other district courts cited to *Giltex* for the proposition that an order which awards attorneys' fees but does not include written findings as to the *Rowe* factors is fundamentally erroneous on its face and subject to reversal even without a transcript or other acceptable substitute. Other district courts then cited to those opinions, and the rule of *Giltex* – that a trial court's failure to make written findings regarding the *Rowe* factors in an order granting attorneys' fees renders the order erroneous on its face and subject to reversal even without a transcript – became a part of Florida's jurisprudence, despite the First District having made it up out of whole cloth. As stated in my opinion, *Rowe* requires a trial court to make certain findings in connection with granting an award of attorneys' fees, but it does not require those findings to be in writing. Contrary to the holding in *Giltex*, a correct application of the presumption of correctness and Section 59.041, *Florida Statutes*, mandates the conclusion that an order awarding attorneys' fees pursuant to *Rowe* is not fundamentally erroneous on its face for failure to include written findings regarding the *Rowe* factors. My opinion reached this correct holding and certified conflict with fourteen decisions from four other district courts of appeal that had followed the *Giltex* rule.

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.

1. *Nelson v. Mirra*, 335 So. 3d 236 (Fla. 5th DCA 2022)

This case came before me on the Circuit Court on an emergency basis when the Petitioner/Mother filed an Emergency Verified Motion for Child Pick-Up Order. The Mother alleged that the Respondent/Father removed the parties' minor child from the Mother's custody and refused to return the child to her. The Parties were not married and the child was born out-of-wedlock. The Respondent was listed as the Father on the child's birth certificate and more than sixty days had passed since the birth certificate was issued. After I denied the motion, the Mother filed a Motion for Reconsideration. The Mother made two arguments: (1) The Father being listed on the minor child's birth certificate did not establish the Father's legal paternity as a matter of law and, therefore, the Mother was the only legal parent; and (2) The Mother was entitled to primary residential custody of the child under Section 744.301(1), *Florida Statutes*, which states in pertinent part:

The parents jointly are the natural guardians of their own children and of their adopted children, during minority... The mother of a child born out of wedlock is the natural guardian of the child and is entitled to primary residential care and custody of the child unless the court enters an order stating otherwise.

I denied the Motion for Reconsideration and found that: (1) pursuant to Section 742.10(4), *Florida Statutes*, because sixty days had passed since the Father's voluntary acknowledgment of paternity in the birth certificate, the voluntary acknowledgment of paternity constituted a legal establishment of paternity by the Father; and (2) the Father had an equal right to custody of the minor child along with the Mother.

The Fourth District Court of Appeal held in *Stewart v. Walker*, 5 So.3d 746, 749 (Fla. 4th DCA 2009), that “the last sentence [of Section 744.301(1)] applies only when there is no father who has declared his paternity and acted like a father to the child.” Relying on a case from the Fifth DCA, the Fourth DCA held that “when an unwed father demonstrates and carries out the requisite settled purpose to be a father, he comes within the first sentence of the statute, making him a natural guardian along with the unwed mother.” *Id* (quoting *State v. Earl*, 649 So.2d 297, 298 (Fla. 5th DCA 1995) (internal quotations omitted)). The Fourth DCA reversed a trial court that applied the last sentence of Section 744.301(1) to find that a Father of a child born out-of-wedlock was not a custodial parent of the child.

On appeal in *Nelson v. Mirra*, the Fifth DCA agreed with my holding that the Father’s voluntary acknowledgment of paternity in the birth certificate established the Father’s legal paternity. However, the Fifth DCA found that the Father’s established legal paternity did not afford him custody rights without a prior court order granting custody rights, and that the last sentence of Section 744.301(1) granted the Mother primary residential custody over the Father. The Fifth DCA reversed my order on this basis and remanded the case with instructions to hold an evidentiary hearing on the Mother’s emergency motion.

2. *Arroyo v. Garcia*, 339 So. 3d 1097 (Fla. 5th DCA 2022)

This case was a child support case in the Circuit Court primarily handled by the General Magistrate assigned to my division. My Order ratifying the Report and Recommendation of the General Magistrate was reversed by the Fifth DCA.

- 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.

*Ortiz v. State*, 416 So. 3d 413 (Fla. 6th DCA 2025)

*Middlebrook v. State*, 403 So. 3d 508 (Fla. 6th DCA 2025)

*Raber v. State*, 2025 WL 3039434 (Fla. 6th DCA Oct. 31, 2025)

*Lightsey Cattle Co. v. Fla. Fish and Wildlife Conserv. Comm.*, 413 So. 3d 182 (Fla. 6th DCA 2024)

*Hargrove v. State*, 412 So. 3d 817 (Fla. 6th DCA 2024)

*Armstrong v. State*, 395 So. 3d 1127 (Fla. 6th DCA 2024) (Mize, J., concurring)

*Gonzalez v. State*, 412 So. 3d 829 (Fla. 6th DCA 2024) (Mize, J., concurring)

*Jean v. State*, 369 So. 3d 1235 (Fla. 6th DCA 2023)

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

Not to my knowledge.

- 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.

I have been a District Judge on the Florida Sixth District Court of Appeal since January 1, 2023. I stood for retention election to the District Court in 2024 and was successfully retained. Prior to becoming a District Judge, I served as a Circuit Judge on the Ninth Circuit Court of Florida from February 22, 2021 through December 31, 2022. I was a candidate to retain my seat as a Circuit Judge in 2022. At the close of qualifying on April 29, 2022, I was unopposed and, as a result, I was elected without opposition.

#### **NON-LEGAL BUSINESS INVOLVEMENT**

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

N/A

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

Since being admitted to The Florida Bar, the only occupation or profession I have engaged in other than practicing law is serving in my prior position as a Circuit Judge and in my current position as a District Judge. From February 22, 2021 through June 30, 2022, my salary as a Circuit Judge was \$165,509.00 per year. From July 1, 2022 through December 31, 2022, my salary as a Circuit Judge was \$182,060.00 per year. From January 1, 2023 through June 30, 2023, my salary as a District Judge was \$202,440.00 per year. From July 1, 2023 through June 30, 2024, my salary as a District Judge was \$212,562.00 per year. From July 1, 2024 through June 30, 2025, my salary as a District Judge was \$218,939.00 per year. Since July 1, 2025, my salary as a District Judge has been \$223,318.00 per year.

## **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.

There are no types or classifications of cases or litigants for which it would be difficult for me to sit as the presiding judge. I would handle every case impartially and treat all litigants fairly and equally. Since becoming a judge, I have not recused from a significant number of cases.

## **PROFESSIONAL ACCOMPLISHMENTS AND OTHER ACTIVITIES**

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

None.

- 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.

“From Circuit to District Court: Judicial Perspectives on Preservation,” judicial panel discussion as part of CLE program, “The Art of Objecting,” presented by The Florida Bar Appellate Practice Section, via Zoom, October 7, 2025.

Served as moderator for “Does Prior Panel Precedent Rule? Two Judges Debate,” a program presented by the Orlando Lawyers Chapter of the Federalist Society, Orlando, Florida, September 18, 2025.

Interview before the Judicial Nominating Commission for the Florida Supreme Court, May 3, 2023. Available here: <https://www.youtube.com/watch?v=r3BwFnKKGUE>

“Advanced Alimony,” panel discussion at the Orange County Bar Association Bench Bar Conference, Orlando, Florida, April 8, 2022.

“Attorneys’ Fees and Costs in Family Law Cases: A View from the Family Law Bench of the Ninth Judicial Circuit,” CLE webinar presented by the Family Law Committee of the Orange County Bar Association, March 18, 2022.

Interviewed on “Legal Limit” Podcast, presented by the Orange County Bar Association. Interview recorded on March 10, 2022. Interview is unaired as of the date of this application.

Judicial panel discussion during online CLE seminar entitled “Master Class for Discovery,” presented by the Family Law Committee of the Orange County Bar Association, February 18, 2022.

Interviewed on “Open Ninth” Podcast, presented by the Ninth Circuit Court of Florida, December 13, 2021. Audio available at <https://ninthcircuit.org/openninth/judicial-spotlight-0>

Brief remarks and Q&A session at seminar entitled “The Ethics of Modern Family Formation Through Adoption,” sponsored by Barry School of Law Family Law Journal, Orlando, Florida Nov. 18, 2021.

Judicial Investiture, presented by the Ninth Circuit Court of Florida, Orlando, Florida, November 5, 2021. Video available at <https://9thnow.lightcast.com/player/23077/413820>

Interviewed on “Legal Morse of Action” Podcast, October 29, 2021. Video available at <https://www.youtube.com/watch?v=6f3BxsQeE2E>

“A Discussion of the Roles of Federal Versus State Judges,” panel discussion presented by the Orlando Chapter of the Federalist Society, Orlando, Florida, October 20, 2021.

Guest speaker in Family Law class taught by Judge Eric DuBois, Florida Agricultural and Mechanical University College of Law, Orlando, Florida, September 30, 2021.

“Meet the Judges,” online panel discussion presented by the Family Law Committee of the Orange County Bar Association, April 16, 2021.

“Practical Advice for Foreign Parties Facing Civil Litigation in the United States,” presented to Institute for U.S. Law, Washington, D.C., August 7, 2017.

“The Telephone Consumer Protection Act: What Every Counsel Should Know To Avoid Surprise Liability,” webinar sponsored by CELESQ AttorneysEd Center, February 16, 2017.

“The Telephone Consumer Protection Act (TCPA) in Practice: Overview of the FCC Omnibus Declaratory Ruling and Order,” webinar sponsored by the Florida Hospital Association, October 13, 2015.

Selected to interview Justice Clarence Thomas at Marshall M. Criser Distinguished Lecture, University of Florida College of Law, Gainesville, FL, February 4, 2010.

- 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.

Guest speaker for a session of a Family Law class taught by Judge Eric DuBois, Florida Agricultural and Mechanical University College of Law, September 30, 2021.

Presented CLE entitled “Attorneys’ Fees and Costs in Family Law Cases: A View from the Family Law Bench of the Ninth Judicial Circuit”, which was a webinar presented by the Family Law Committee of the Orange County Bar Association, March 18, 2022.

- 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.

Order of the Coif, University of Florida College of Law Chapter, Inducted Spring 2010

Book Award, Florida Constitutional Law, University of Florida College of Law, Spring 2009

Frank E. Maloney Award for Outstanding Candidate, Florida Law Review, Spring 2009

Honors in Appellate Advocacy, University of Florida College of Law, Spring 2008

Dean’s List (All semesters of law school)

Pro Bono Certificate, University of Florida College of Law

Florida Academic Scholar (Undergraduate at University of Florida)

Golden Key International Honor Society, Inducted Fall 2006

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

No.

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

Conference of Florida District Court of Appeal Judges, Member, Jan. 1, 2023 – Present

Sixth District Representative, Legislative Committee, Jan. 2023 – Present

Chair, Legislative Committee, Jan. 2025 – Aug. 2025

Co-Chair, Legislative Committee, Aug. 2025 – Present

Conference of Florida Circuit Court Judges, Member, Feb. 21, 2021 – Dec. 31, 2022

Florida Courts Education Committee, Member, July 2024 – Present

Florida Judicial College, Associate Dean for the New Appellate Judges Program, July 2024 – Present

Florida Bar Committee on the Rules of Gen. Practice and Jud. Admin., Member, July 1, 2024 – Present

Federalist Society, Member, 2007 – Present

Board Member, DC Young Lawyers Chapter, June 2017 – Feb. 2018

President, University of Florida Chapter, Fall 2008 – Spring 2010

American Bar Association, Member, Nov. 2010 – Aug. 2012

Orange County Bar Association, Member, Apr. 2012 – May 2015 & Dec. 2020 – Present

Hillsborough County Bar Association, Member Nov. 2010 – June 2012

Federal Bar Association, Member, May 2012 – Apr. 2017

Republican National Lawyers Association, former member

George C. Young American Inn of Court, Member, July 2021 – June 2023

Central Florida Family Law Inn of Court, Member, Apr. 2021 – June 2023

Central Florida Association for Women Lawyers, Member, June 2021 – June 2023

States Bars of Florida, Colorado, Texas, Virginia, West Virginia and Wyoming (See Exhibit A hereto)

Bar of the District of Columbia (See Exhibit A hereto)

- 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.

University Club of Orlando, Member, Mar. 2021 – Jan. 2023

Seminole County Gun and Archery Association, Member, Aug. 2022 – Present

National Rifle Association, Member, 2002 – Mar. 7, 2021

- 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.

My most significant pro bono case as an attorney was representing the Washington D.C. area Goodwill affiliate in the lawsuit entitled *Davis Memorial Goodwill Industries v. Alaa Garada*, Case No. 1:17-cv-00347-TSE-JFA, in the U.S. District Court for the Eastern District of Virginia. I litigated this case on a pro bono basis from March through June 2017.

45. Please describe any hobbies or other vocational interests.

Marksmanship, Hiking, Constitutional Law, Barbeque

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

I have never served in the military.

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

N/A

## **FAMILY BACKGROUND**

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

I have been married to Eugenia Mize since January 21, 2012. She is an attorney. She is not currently employed.

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.

None.

## **CRIMINAL AND MISCELLANEOUS ACTIONS**

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

No.

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

No.

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

No.

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

Like many judges, I have been sued by litigants. Each lawsuit involved a case over which I presided. In each lawsuit, multiple judges other than myself were also named as defendants. None of the lawsuits have resulted in any liability or adverse finding against me of any kind. Here is each lawsuit of which I am aware:

- *Ayla Haeberli v. State of Florida, et al.*, Case No. 6:25-cv-105-JSS-RMN, U.S. District Court for the Middle District of Florida. This lawsuit was filed on January 24, 2025. The plaintiff sued me along with numerous other judges and other defendants. The case remains pending.
- *Payne v. Munyon, et al.*, Case No., 6:25-cv-615-WWB-LHP, U.S. District Court for the Middle District of Florida. This lawsuit was filed on April 9, 2025. This plaintiff sued me along with all other members of the Sixth District Court of Appeal and all of the justices of the Florida Supreme Court. The case remains pending.
- *Holley v. Traver, et al.*, Case No. 8:25-cv-1277-SDM-TGW, U.S. District Court for the Middle District of Florida. This lawsuit was filed on May 19, 2025. This plaintiff sued me and two other members of the Sixth District Court of Appeal. Before I received service of the complaint and without me filing any response to the lawsuit, the Court dismissed the complaint for failing to state a claim and entered a judgment of dismissal.
- *Saunders v. Nardella, et al.*, Case No. 8:25-cv-1361-WFJ-NHA, U.S. District Court for the Middle District of Florida. This lawsuit was filed on May 28, 2025. The plaintiff sued me along with numerous other judges, the Clerk of the Sixth District Court of Appeal, and the Sixth District Court of Appeal itself. The case remains pending.
- *Torres, et al. v. Snead, et al.*, Case No. 6:25-cv-1203-PGB-DCI, U.S. District Court for the Middle District of Florida. This lawsuit was filed on July 2, 2025. These plaintiffs sued me along with all of the other members of the Sixth District Court of Appeal as well as U.S. District Judge Julie Sneed and other defendants. On September 15, 2025, the plaintiffs filed an amended complaint which removed all claims against me and the other judges that were defendants.

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

No.

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

No.

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

No.

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

No.

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

No.

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

No.

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

No.

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

I have always complied with all legally required tax return filings. In 2012 and 2013, my wife and I paid estimated tax penalties of \$23 and \$15, respectively. These were the first two years that we were married and we slightly underestimated the withholding amounts for our joint income.

## **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.

My extensive experience as a trial judge, appellate judge and as an attorney practicing complex civil litigation have prepared me to be an excellent justice on the Florida Supreme Court.

I have deep knowledge of both the trial and appellate processes. I have served on a district court of appeal and understand the dynamics of making decisions and drafting opinions on a multimember court with a heavy case load. I have demonstrated an ability to succeed in producing valuable opinions that correctly address difficult legal issues and garner the support of my colleagues. Since I joined the District Court, the number of majority opinions I have published has consistently been among the highest of the members of my court.

On the trial level, I conducted numerous evidentiary proceedings as an attorney and presided over more than 40 trials and countless evidentiary proceedings as a trial judge. Many of the cases over which I presided involved complex issues such as The Hague Convention, issues of foreign law and the effect of foreign legal proceedings and foreign administrative actions in the State of Florida, medical conditions and disabilities, foreign assets and entities, complex business arrangements, and construction projects. The cases I litigated as an attorney likewise often involved complex and challenging subject matter, such as international cross-border business

transactions, complex financial relationships, and intellectual property rights in computer code. From this experience, I understand the litigation process as it happens at the trial level. My in-depth and practical understanding of the trial process will assist me in making correct legal rulings on the Florida Supreme Court as well as in performing the Court's rule-making function.

I am also extremely well-prepared to sit on the body that governs the legal profession and The Florida Bar. A majority of the members of The Florida Bar practice in small firms. In addition to practicing in large law firms for more than seven years, I also practiced law as a solo practitioner for three years. My experience as a solo practitioner and personal knowledge of the unique challenges faced by small firms will assist me as a member of the body that governs the members of The Florida Bar.

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.

First and foremost, I understand that the rule of law is paramount to the American system of government. In order to uphold the rule of law, courts must follow and interpret the law as it is written. Judges must say what the law is – not what the judges believe the law should be. Laws, whether constitutional or statutory, derive their legitimacy from the democratic process that produced them. For this reason, courts should interpret constitutional provisions according to their text and the original public meaning of that text at the time that the provision was enacted. This is the proper way to interpret constitutional provisions because the text of the provision, based on the public's understanding of the meaning of that text at the time of ratification, is what was ratified by the people that enacted the provision. Similarly, statutes should be interpreted according to their text and the common meaning of that text at the time that the statute was passed. The text of the statute is what was enacted by the legislature pursuant to the constitutional process. If I am appointed as a justice on the Florida Supreme Court, I will never waiver from these principles. I will never allow my personal views to influence my application of the law. I will never engineer an outcome to comport with my personal preferences. I will never make a decision out of a desire to be popular or to follow public opinion. Every decision I make will apply the law as it is written.

Second, my career reflects the intellectual rigor and work ethic necessary to serve as a justice on the Florida Supreme Court. As an attorney, I litigated numerous cases that involved large and complicated universes of facts and legal issues. As a Circuit Judge, I adeptly handled cases involving complex legal and factual issues and did so in the emotionally charged and fast-paced environment that family law cases often present. On the District Court, I have handled all manner of appeals under a heavy case load, and I have consistently rendered opinions that faithfully applied the law to the facts of each case. My career demonstrates a track record of successfully evaluating complicated and difficult cases to determine the key legal issues and resolve them correctly according to the law.

Lastly, I will bring consistent and steadfast dedication to my job as a justice on the Florida Supreme Court. I will work as hard as necessary to ensure that I apply the law correctly in every

case. No matter how heavy the workload or how difficult the case, I will consider it my moral and ethical obligation to ensure that every decision I make is correct under the law.

**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.

Hon. Anne-Leigh Gaylord Moe  
U.S. District Court for the  
Middle District of Florida  
401 W. Central Blvd.  
Orlando, FL 32801  


Hon. Ed Artau  
U.S. District Court for the  
Southern District of Florida  
701 Clematis Street  
West Palm Beach, FL 33401  


Hon. Meredith Sasso  
Supreme Court of Florida  
500 S. Duval St.  
Tallahassee, FL 32399  


Hon. Mary Nardella  
Sixth District Court of Appeal  
811 E. Main St.  
Lakeland, FL 33801  


Hon. Paetra Brownlee  
Sixth District Court of Appeal  
811 E. Main St.  
Lakeland, FL 33801  


Hon. Roger Gannam  
Sixth District Court of Appeal  
811 E. Main St.  
Lakeland, FL 33801  


Hon. Eric Eisnaugle  
Fifth District Court of Appeal  
300 S. Beach St.  
Daytona Beach, FL 32114  


Hon. Diego Madrigal, III  
Ninth Circuit Court of Florida  
425 N. Orange Ave.  
Orlando, FL 32801  


Hon. Michael J. Hooi  
Thirteenth Judicial Circuit  
800 E. Twiggs Street  
Tampa, FL 33602  


Matthew Richardson, Esq.  
Brown Rudnick, LLP  
601 Thirteenth St. NW, Suite 600  
Washington, D.C. 20005  


CERTIFICATE

I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(1), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

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

Dated this 15 day of December, 2025.

Joshua A. Mize  
Printed Name

*Joshua A. Mize*  
Signature

State of Florida  
County of Orange

Sworn to (or affirmed) and subscribed before me by means of

physical presence OR  online notarization

this 15<sup>th</sup> day of December, 2025

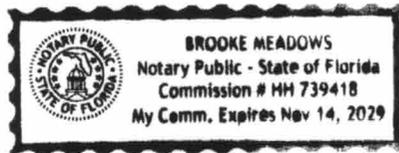
By Joshua A. Mize

Personally known

Produced ID

Type of Identification FL-DL

*Brooke Meadows*  
Signature Notary Public



Printed name of Notary Public

(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: \$0**

	2024	2023	2022
<b>Last Three Years:</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>

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: \$0**

	2024	2023	2022
<b>Last Three Years:</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>

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

**Current Year-To-Date: \$234,918.72**

	2024	2023	2022
<b>Last Three Years:</b>	<b>\$244,292.58</b>	<b>\$239,901.00</b>	<b>\$184,401.68</b>

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: \$234,918.72**

	2024	2023	2022
<b>Last Three Years:</b>	<b>\$244,292.58</b>	<b>\$239,901.00</b>	<b>\$184,401.68</b>

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: \$202,518.72**

	2024	2023	2022
<b>Last Three Years:</b>	<b>\$211,892.58</b>	<b>\$207,501.00</b>	<b>\$170,061.68</b>

My income earned from sources other than the practice of law was my salary as a judge and income from a rental property that my wife and I own.

**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 Sept. 30, 2025 was \$1,713,727.51

**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 \$ 15,000.00

**ASSETS INDIVIDUALLY VALUED AT OVER \$1,000:**

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

VALUE OF ASSET

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)	VALUE OF ASSET
See Exhibit B	

**PART C - LIABILITIES**

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

NAME AND ADDRESS OF CREDITOR

AMOUNT OF LIABILITY

Freedom Mortgage, 951 Yamato Road, Boca Raton, FL 33431	\$452,383.02
Wells Fargo, 429 Montgomery St., San Francisco, CA 94104	\$397,619.32

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:

NAME AND ADDRESS OF CREDITOR

AMOUNT OF LIABILITY


**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
See Exhibit C		

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

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

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

	BUSINESS ENTITY #1	BUSINESS ENTITY #2	BUSINESS ENTITY #3
NAME OF BUSINESS ENTITY			
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.

*M. A. J.*  
 SIGNATURE

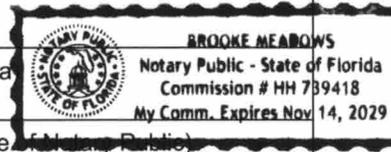
STATE OF FLORIDA

COUNTY OF Orange

Sworn to (or affirmed) and subscribed before me this 15<sup>th</sup> day of Dec, 2025 by Jashua A. Mize

*Brooke Meadows*  
 (Signature of Notary Public—State of Florida)

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



Personally Known \_\_\_\_\_ OR Produced Identification

Type of Identification Produced FL-DL

## 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: December 15, 2025

JNC Submitting To: Supreme Court of Florida

Name (please print): Joshua A. Mize

Current Occupation: Judge

Telephone Number: XXXXXXXXXX

Attorney No.: 86163

Gender (check one):  Male  Female

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

Hispanic

Black

American Indian/Alaskan Native

Asian/Pacific Islander

County of Residence: XXXXXXXXXX

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.

Joshua A. Mize

---

Printed Name of Applicant

  
Signature of Applicant

Date: December 15, 2025

**Exhibit A - Joshua A. Mize – State Bar and Federal Court Admissions**

<b><u>State or Federal Court</u></b>	<b><u>Date Admitted</u></b>
Florida	10/05/2010
District of Columbia	05/13/2016
Virginia	09/14/2016
West Virginia	02/15/2017
Texas	08/10/2017
Wyoming	01/22/2018
Colorado	06/06/2018
U.S. Supreme Court	05/14/2018
U.S. Court of Appeals for the Second Circuit	12/20/2010
U.S. Court of Appeals for the Fourth Circuit	03/25/2020
U.S. Court of Appeals for the Fifth Circuit	08/31/2020
U.S. Court of Appeals for the Sixth Circuit	08/31/2020
U.S. Court of Appeals for the Seventh Circuit	08/21/2020
U.S. Court of Appeals for the Tenth Circuit	08/28/2020
U.S. Court of Appeals for the Eleventh Circuit	04/08/2015
U.S. District Court for the District of Columbia	07/11/2016
U.S. District Court for the Middle District of Florida	12/03/2010
U.S. District Court for the Southern District of Florida	04/05/2011
U.S. District Court for the Northern District of Florida	03/09/2015
U.S. District Court for the Northern District of Texas	09/05/2017
U.S. District Court for the Western District of Texas	10/12/2017
U.S. District Court for the Eastern District of Texas	02/04/2016
U.S. District Court for the Southern District of Texas	09/06/2017
U.S. District Court for the Eastern District of Virginia	10/21/2016
U.S. District Court for the Western District of Virginia	12/08/2016
U.S. District Court for the Southern District of West Virginia	02/15/2017
U.S. District Court for the Northern District of West Virginia	05/22/2017
U.S. District Court for the District of Colorado	02/05/2016
U.S. District Court for the Northern District of Illinois	10/03/2016
U.S. District Court for the Central District of Illinois	10/11/2017
U.S. District Court for the Southern District of Illinois	03/01/2016
U.S. District Court for the District of Nebraska	05/02/2016
U.S. District Court for the Eastern District of Arkansas	11/11/2016
U.S. District Court for the Western District of Arkansas	11/11/2016
U.S. District Court for the District of Maryland	10/27/2017
U.S. District Court for the District of Wyoming	04/04/2018
U.S. District Court for the Western District of Michigan	07/23/2018
U.S. District Court for the Eastern District of Michigan	08/08/2018
U.S. District Court for the Western District of Wisconsin	07/31/2018
U.S. District Court for the Eastern District of Wisconsin	08/06/2018
U.S. District Court for the District of North Dakota	08/07/2018
U.S. District Court for the Northern District of Indiana	09/06/2018
U.S. District Court for the Southern District of Indiana	09/14/2018
U.S. District Court for the District of Connecticut	09/10/2018
U.S. District Court for the Eastern District of Oklahoma	12/21/2018
U.S. District Court for the Western District of Oklahoma	6/14/2018
U.S. District Court for the Northern District of Oklahoma	6/25/2018
U.S. District Court for the District of New Mexico	05/16/2019

**Exhibit B**  
**Joshua Aaron Mize**  
**Assets as of September 30, 2025**

<b><u>Assets</u></b>	<b><u>Value of Asset (as of September 30, 2025)</u></b>
Household Goods & Personal Effects	\$15,000.00
Primary Residence in Winter Park, FL	\$934,100.00
Rental Property in Orlando, FL	\$602,700.00
Chase Checking Account	\$12,928.72
Goldman Sachs Savings Account	\$36,510.70
Ally Bank Savings Account	\$20,984.85
Capital One Bank Savings Account	\$2,027.86
Vanguard Large-Cap Stocks Index in Florida Deferred Compensation Plan	\$132,732.13
PLTR (in Chase Brokerage)	\$1,824.20
TSLA (in Chase Brokerage)	\$76,491.84
SIVR (in Chase Brokerage)	\$45,458.56
AAAU (in Chase Brokerage)	\$93,775.20
BAR (in Chase Brokerage)	\$80,534.96
GLDM (in Chase Brokerage)	\$109,705.75
SIVR (in Robinhood Brokerage)	\$22,395.68
AAAU (in Robinhood Brokerage)	\$17,344.60
BAR (in Robinhood Brokerage)	\$13,739.66
GLDM (in Robinhood Brokerage)	\$60,089.70
SIVR (in Chase IRA)	\$42,256.00
AAAU (in Chase IRA)	\$57,599.32
BAR (in Chase IRA)	\$57,428.73
GLDM (in Chase IRA)	\$65,288.30
2023 Volvo XC-90	\$39,364.00
2022 Tesla Model 3	\$26,689.00

**Exhibit C**  
**Joshua Aaron Mize**  
**Income for 2024**

<b><u>Name of Source of income</u></b> <b><u>Exceeding \$1,000</u></b>	<b><u>Address of Source of Income</u></b>	<b><u>Amount</u></b>
Sixth District Court of Appeal	811 E. Main St., Lakeland, FL 33801	\$211,892.58
Rental Income	844 W. Winter Park St., Orlando, FL 32804	\$32,400.00
Goldman Sachs Bank USA (Interest Income)	PO Box 70379, Philadelphia, PA 19176	\$1,561.23
Robinhood Securities, LLC (Interest Income)	85 Willow Road, Menlo Park, CA 94025	\$1,112.84
Sale of GLDM	J.P. Morgan Securities LLC, PO Box 183211, Columbus, OH 43218	\$54,661.80
Sale of BAR	J.P. Morgan Securities LLC, PO Box 183211, Columbus, OH 43218	\$12,890.30
Sale of AAAU	J.P. Morgan Securities LLC, PO Box 183211, Columbus, OH 43218	\$10,581.66
Sale of FSLR	J.P. Morgan Securities LLC, PO Box 183211, Columbus, OH 43218	\$5,206.37
Sale of NVDA	J.P. Morgan Securities LLC, PO Box 183211, Columbus, OH 43218	\$4,187.40

# Writing Samples

413 So.3d 182

District Court of Appeal of Florida, Sixth District.

LIGHTSEY CATTLE COMPANY, Appellant,

v.

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION, Appellee.

Case No. 6D2023-0587

I

July 12, 2024

### Synopsis

**Background:** Land owner appealed order entered by Fish and Wildlife Conservation Commission, which upheld commission's issuance of a conditional hunting preserve license to land owner, on the condition that he construct a conforming fence around his property.

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

commission's order upholding the grant of a conditional hunting preserve license to land owner was not a final agency action, and thus the District Court of Appeal lacked jurisdiction over land owner's appeal of the decision, and

where a party seeks certiorari review of quasi-judicial administrative action of a state constitutional entity that is not subject to the Administrative Procedure Act (APA), the proper court in which to seek such review is the circuit court.

Petition transferred.

**Procedural Posture(s):** Review of Administrative Decision.

Appeal from the Florida Fish and Wildlife Conservation Commission. Lower Tribunal No. 21-0059

### Attorneys and Law Firms

Diane Buerger, Victor R. Smith, and Michael E. Raiden, of Victor R. Smith Law Group, P.A., Winter Haven, for Appellant.

Bridget K. McDonnell, Assistant General Counsel, and Joseph Meyer, Assistant General Counsel, of Florida Fish and Wildlife Conservation Commission, Tallahassee, for Appellee.

### Opinion

MIZE, J.

\***183** In this administrative law appeal, Appellant, Lightsey Cattle Company (“Appellant” or “Lightsey”), appeals a final order entered by the Florida Fish and Wildlife Conservation Commission (the “Commission”) that upheld the Commission's issuance of a conditional hunting preserve license \***184** to Lightsey.<sup>1</sup> Specifically, Lightsey objects to the condition placed on the license, which is that Lightsey construct a fence around its hunting preserve. We conclude that this court lacks jurisdiction over the appeal and that Lightsey's proper remedy is to seek review of the Commission's order by petition for writ of certiorari in circuit court. Because the notice of appeal was timely and otherwise sufficient to invoke certiorari jurisdiction, we transfer this case to the Circuit Court of the Ninth Judicial Circuit in and for Osceola County.

### **Background and Procedural History**

The Commission was created by article IV, section 9 of the Florida Constitution. The Constitution provides that the Commission “shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life.”<sup>2</sup> Art. IV, § 9, Fla. Const. The Commission's power to adopt rules to regulate game and fresh water fishing in the State is exclusive, and its rules adopted to this end are tantamount to legislative acts. *Airboat Ass'n of Fla., Inc. v. Fla. Game & Fresh Water Fish Comm'n*, 498 So. 2d 629, 631-32 (Fla. 3d DCA 1986); *Wakulla Com. Fishermen's Ass'n. v. Fla. Fish & Wildlife Conservation Comm'n*, 951 So. 2d 8, 9 (Fla. 1st DCA 2007).

Pursuant to its constitutional authority, the Commission has adopted a rule requiring every private hunting preserve to be enclosed by a fence that meets certain requirements, the specifics of which are not material to this appeal. The rule is set forth in Rule 68A-12.010(8) of the Florida Administrative Code (the “Fencing Rule”).

In 1987, Lightsey applied for and received from the Commission's predecessor agency, the Florida Game and Freshwater Fish Commission (the “Predecessor Commission”), a license to operate a hunting preserve on Brahma Island, which is located inside Lake Kissimmee in Osceola County.<sup>3</sup> The hunting preserve encompasses the entire island. The license was valid for one year. The license contained a note handwritten by a then-Bureau Chief of the Predecessor Commission which stated, “water barrier OK for existing facilities.” After this license was issued, Lightsey continued to apply for and receive annual license renewals every year from the Predecessor Commission and later, the Commission, without either the Predecessor Commission or the Commission ever making any attempt to enforce the Fencing Rule against Lightsey's island hunting preserve. Over the years, the Commission's annual inspection reports for the hunting preserve often contained references to Lightsey's exemption from the **\*185** Fencing Rule and noted that the exemption was granted in 1987.<sup>4</sup>

The Commission's position with respect to Lightsey's hunting preserve changed in 2021. When Lightsey's license came up for its annual renewal in June of 2021, the Commission granted Lightsey only a conditional hunting preserve license. Specifically, the license conditioned Lightsey's ability to operate the hunting preserve on Lightsey erecting a fence around the hunting preserve that complied with the Fencing Rule. The license provided that Lightsey's failure to comply with the Fencing Rule within twelve months of the issuance of the license would result in the Commission denying Lightsey a renewal of its license for the following twelve-month period.

Lightsey challenged the Commission's issuance of the conditional license, and specifically the imposition of the condition for Lightsey to comply with the Fencing Rule, by filing with the Commission a petition (the “Petition”) for an administrative proceeding pursuant to sections 120.569 and 120.57, Florida Statutes, which are part of the Administrative Procedure Act (the “APA”).<sup>5</sup> These sections provide for two types of hearings. Section 120.57(1) applies whenever a proceeding involves a disputed issue of material fact. § 120.569(1), Fla. Stat. (2011). Hearings under section 120.57(1) are conducted by an administrative law judge assigned by the Division of Administrative Hearings (“DOAH”). Section 120.57(1) also provides the parties with various significant procedural rights, including the right to, among other things, present evidence and cross-examine witnesses. A hearing conducted under section 120.57(1) is referred to as a “formal hearing.” Section 120.57(2) applies when a proceeding does not involve a disputed issue of material fact. § 120.569(1), Fla. Stat. Hearings under section 120.57(2) are conducted by a hearing officer assigned by the Commission. Under section 120.57(2), the parties have significantly fewer procedural rights and do not have the same rights with respect to the submission of evidence. A hearing conducted under section 120.57(2) is referred to as an “informal hearing.”

In its Petition, Lightsey asserted, among other things, that the notation on its 1987 license constituted a permanent exemption from the Fencing Rule (including any future amendments thereto) granted to Lightsey by the Commission. Lightsey requested a formal hearing before DOAH under section 120.57(1) to present evidence and prove that it possessed the exemption. The

Commission responded to the Petition by sending Lightsey a letter stating that there were no material facts in dispute and that, therefore, the Commission would only allow Lightsey an informal hearing under section 120.57(2). Despite additional subsequent objections from Lightsey, the Commission maintained its position that Lightsey was not entitled to a formal hearing under section 120.57(1).

The informal hearing was conducted in December 2021. In its brief submitted to the Commission before the hearing and then again at the hearing, Lightsey argued that it possessed an exemption to the Fencing Rule and that, even if it did not actually possess an exemption, the doctrine \*186 of estoppel should prevent the Commission from enforcing the Fencing Rule against Lightsey. At the hearing, Lightsey also again objected to the Commission holding an informal hearing, again requested that the hearing officer refer the parties to DOAH to hold a formal hearing under section 120.57(1), and then attempted to present various pieces of evidence. The Commission argued in response that there were no material facts in dispute because the Commission, as a matter of law, does not have the legal authority to grant exemptions to the Fencing Rule.<sup>6</sup> The Commission asserted that since it cannot legally grant an exemption to the Fencing Rule, the notation on Lightsey's 1987 license could not, as a matter of law, be an exemption regardless of what the notation stated. The hearing officer denied Lightsey's request for a formal hearing and proceeded with the informal hearing.<sup>7</sup>

After the hearing, the hearing officer issued his Recommended Order, which denied Lightsey's challenge to the conditional hunting preserve license. While the order is not perfectly clear, the hearing officer appears to have adopted the position of the Commission that the Commission cannot legally grant an exemption to the Fencing Rule and that, therefore, the notation on Lightsey's 1987 license could not, as a matter of law, be an exemption. Lightsey submitted Exceptions to the Recommended Order. In June 2022, the Commission entered a Final Order which rejected Lightsey's exceptions, accepted the Recommended Order of the hearing officer, and upheld the issuance of Lightsey's conditional hunting preserve license. Lightsey then filed this appeal.

On appeal, Lightsey argues that its Petition raised disputed issues of material fact, specifically whether Lightsey possessed a permanent exemption from the Fencing Rule and whether the Commission should be estopped from enforcing the Fencing Rule against Lightsey. Lightsey argues that because its Petition presented disputed issues of material fact, the Commission committed reversible error by refusing to grant Lightsey a formal administrative hearing before DOAH under section 120.57(1).

## Analysis

### **I. Jurisdiction**

Both parties in this case agree that we possess jurisdiction over this appeal. However, “the parties cannot confer jurisdiction on the court that it does not have by agreement or acquiescence.” *Shannon v. Cheney Bros. Inc.*, 157 So. 3d 397, 399 (Fla. 1st DCA 2015). “We have an independent obligation to examine our jurisdiction in every case.” *Riggins v. Clifford R. Rhoades, P.A.*, 373 So. 3d 655, 660 n.4 (Fla. 6th DCA 2023). Accordingly, we begin by determining whether we possess jurisdiction.

“Article V, Section 4(b)(2) of the Florida Constitution establishes the basic jurisdiction of district courts of appeal to review the action of administrative agencies by direct appeal.” \*187 *Airboat Ass'n*, 498 So. 2d at 631. Article V, section 4(b)(2) provides: “District courts of appeal shall have the power of direct review of administrative action, as prescribed by general law.”

Thus, in order for a district court of appeal to have jurisdiction over a direct appeal of an action by an administrative agency, there must be a general law prescribing such jurisdiction. In this case, the only general law that the parties have cited in support of their assertion that we possess jurisdiction over this appeal is section 120.68 of the APA, which states: “A party who is adversely affected by final agency action is entitled to judicial review.... Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.” § 120.68(1)(a), (2)(a), Fla. Stat. (2016).

The problem is that the Commission, when acting pursuant to its constitutional powers, is not an “agency” as defined by the APA, and its actions, therefore, are not “agency action.” Section 120.52(1)(a) of the APA defines agency to mean certain officers and governmental entities, including the Commission, “if acting pursuant to powers *other than those derived from the constitution.*” (emphasis added). In this case, both parties agree that the Commission promulgated the Fencing Rule pursuant to its constitutional authority granted by article IV, section 9. Additionally, in enforcing the Fencing Rule, the Commission was exercising the executive power of the state with respect to wild animal life, also pursuant to its constitutional authority. *See* Art. IV, § 9, Fla. Const.; *Wakulla Com. Fishermen's Ass'n*, 951 So. 2d at 9 (“[A] rule adopted by [the Commission] is tantamount to a legislative act.” (quoting *Airboat Ass'n*, 498 So. 2d at 631 (internal quotations omitted))); *Tyson v. Viacom, Inc.*, 760 So. 2d 276, 277 (Fla. 4th DCA 2000) (“The enforcement of laws is a function of the executive branch of government.”); *Curry v. State*, 811 So. 2d 736, 743 (Fla. 4th DCA 2002) (“[T]he enforcement of laws is also a function of the executive branch of government.”). Thus, both in adopting and enforcing the Fencing Rule, the Commission was acting pursuant to powers derived from the Florida Constitution and, therefore, was not an “agency” for purposes of the APA. Consequently, a party who is adversely affected by the Commission's adoption or enforcement of the Fencing Rule is not “adversely affected by final *agency* action” under the APA, nor can judicial review be sought in the appellate district where the *agency* maintains its headquarters because the Commission, for purposes of the Fencing Rule, is not an agency as defined in the APA. *See Decker v. Univ. of W. Florida*, 85 So. 3d 571, 573 (Fla. 1st DCA 2012) (“A decision is reviewable by appeal to a district court of appeal under the general provisions of the Administrative Procedure Act only if the person or entity rendering the decision falls within the statutory definition of an agency. The Act limits the definition of an agency to persons or entities ‘acting pursuant to powers other than those derived from the constitution.’ The significance of this limitation is clear: when an officer or agency is exercising power derived from the constitution, the resulting decision is not one that is made by an agency as defined in the Administrative Procedure Act.” (internal citations omitted)).

After this Court requested supplemental briefing concerning whether this Court possesses jurisdiction over this appeal, the Commission filed its supplemental brief in which it argued that the Commission actually was acting pursuant to the APA when it denied Lightsey a formal hearing, when it conducted the informal hearing that it \*188 did allow Lightsey, and when it denied Lightsey's Petition and entered the Final Order. Specifically, the Commission argues that article IV, section 9 requires that “[t]he commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions.” With respect to the enforcement of rules promulgated under its constitutional authority, the procedures the Commission has adopted to satisfy this requirement are certain provisions of the APA, including sections 120.569, 120.57 and 120.68.<sup>8</sup> *See* Fla. Admin. Code R. 68-1.008(5). The Commission argues that because the Commission has adopted portions of the APA to govern proceedings concerning the enforcement of rules adopted pursuant to its constitutional authority, including the administrative proceeding at issue in this case, the Commission was acting pursuant to the APA when it denied Lightsey a formal hearing, when it conducted the informal hearing, and when it denied Lightsey's Petition and entered the Final Order upholding the Commission's issuance of Lightsey's conditional license. Accordingly, the Commission argues, its action in entering the Final Order was final agency action under the APA. And because the Commission has adopted section 120.68, judicial review of the Commission's Final Order can be sought in the appellate district where the Commission maintains its headquarters or in any appellate district where a party to the appeal resides. There are two problems with this argument.

First, jurisdiction of a district court of appeal over a direct appeal of administrative action can only be prescribed by general law. Art. V, § 4(b)(2), Fla. Const. The Commission cannot enact a “general law.” *See* Art. III, § 1, Fla. Const. (“The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative district.”); Art. III, § 6, Fla. Const. (“The enacting clause of every law shall read: “Be It Enacted *by the Legislature* of the State of Florida.” (emphasis added)).

While the Commission was certainly permitted to incorporate the APA as its due process procedures, that does not mean that its due process procedures *are* the APA or that the Commission acts pursuant to the APA when it utilizes those procedures. The Commission was not required to adopt the APA as its due process procedures. The Commission could have also adopted the due process procedures used by a particular agency of the federal government or the procedures utilized by another state or an

agency thereof. The Commission could have also written its own procedures from scratch. If the Commission had adopted as its due process procedures the federal Administrative Procedure Act, some due process procedures set forth in the statutes of the State of Georgia, or the Code of Hammurabi for that matter, the Commission would not be acting pursuant to federal law, Georgia law, or the Code of Hammurabi when it conducted its proceedings. Rather, the Commission would be acting pursuant to its own due process procedures which incorporate the text of another set of procedures.

Simply put, when the Commission acts pursuant to its own procedures that incorporate the text of a general law, it is acting under its own procedures, not **\*189** under general law. The Commission has no authority to enact general laws, and it cannot do so by adopting rules that incorporate the text of a general law. The Commission was not acting under the APA when it conducted the administrative proceeding at issue in this case, and there was no final agency action under section 120.68. While section 120.68 is a general law, the Commission's procedures incorporating section 120.68 are not a general law.

Second, section 120.52(1)(a) defines agency to mean certain officers and governmental entities, including the Commission, “if acting pursuant to powers other than those derived from the constitution.” Thus, for an agency to be an agency for purposes of the APA, it must be acting pursuant to a power not derived from the Constitution, such as a power derived from a statute.

Even if the Commission had the authority to and did “adopt the APA” to govern the administrative proceeding at issue in this case such that the Commission was acting pursuant to the APA when it conducted the proceeding (which it does not and did not), the Commission still was not acting pursuant to power *derived from the APA*. The APA does not grant agencies power to act. Rather, the APA governs an agency's exercise of power derived from some source of law other than the APA. § 120.515, Fla. Stat. (2012) (“This chapter provides uniform procedures *for the exercise of specified authority*.” (emphasis added)).

When a statutorily created agency enforces a rule promulgated pursuant to its statutory authority, and the enforcement of that rule against a party requires a hearing under the APA, it was the statute under which the rule was promulgated that granted the agency the power to promulgate and enforce the rule, not the APA. The APA governs the agency's exercise of its authority to promulgate and enforce the rule, but the power to promulgate and enforce the rule is derived from the statute that authorized the agency to promulgate and enforce the rule. Thus, even if the Commission had the power to and did “adopt the APA” to govern the administrative proceeding conducted in this case such that the proceeding was conducted pursuant to the APA, the APA still would not grant us jurisdiction over this appeal because the Commission's power to take action in this case was derived from the Florida Constitution and the Commission's final action, therefore, was not “final agency action” for purposes of section 120.68.

Because there is no general law prescribing this court jurisdiction over a direct appeal of the administrative action taken by the Commission in this case, we lack jurisdiction to decide this appeal.

## II. Appropriate Remedy and Forum

While we lack jurisdiction to decide a direct appeal of the Commission's Final Order, that does not end our analysis. Florida Rule of Appellate Procedure 9.040(c) states that “[i]f a party seeks an improper remedy, the cause must be treated as if the proper remedy had been sought.” Rule 9.040(b)(1) states that “[i]f a proceeding is commenced in an inappropriate court, that court will transfer the cause to an appropriate court.” Therefore, we must determine if Lightsey could have sought a different remedy other than a direct appeal and, if so, what was the appropriate court in which Lightsey should have sought that remedy.

The Florida Constitution gives both district courts and circuit courts the power to issue writs of certiorari. Art. V, § 4(b)(3), Fla. Const. (“A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs **\*190** necessary to the complete exercise of its jurisdiction.”); Art. V, § 5(b), Fla. Const. (Circuit courts “shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction.”).

The power vested by Article V in district courts and circuit courts to issue writs of certiorari includes the authority to issue writs of certiorari as this power existed in courts in the common law. *See G-W Dev. Corp. v. Vill. of N. Palm Beach Zoning Bd. of*

*Adjustment*, 317 So. 2d 828, 829-30 (Fla. 4th DCA 1975); see generally *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 525-28 (Fla. 1995). Florida Rule of Appellate Procedure 9.030 explicitly recognizes the power of district courts and circuit courts to issue common law writs of certiorari, as distinct from their authority to issue writs of certiorari in other circumstances set forth in the rules promulgated by the Florida Supreme Court. As to district courts, Rule 9.030(b)(2), entitled “Certiorari Jurisdiction,” provides that “[t]he certiorari jurisdiction of district courts of appeal may be sought to review ... nonfinal orders of lower tribunals other than as prescribed by rule 9.130 ... or ... final orders of circuit courts acting in their review capacity.” Rule 9.030(b)(3), entitled “Original Jurisdiction,” then provides that “[d]istrict courts of appeal may issue writs of mandamus, prohibition, quo warranto, and *common law certiorari*, and all writs necessary to the complete exercise of the courts' jurisdiction.” (emphasis added). Similarly, Rule 9.030(c), entitled “Certiorari Jurisdiction,” provides that “the certiorari jurisdiction of circuit courts may be sought to review nonfinal orders of lower tribunals other than as prescribed by rule 9.130.” Rule 9.030(c)(3), entitled “Original Jurisdiction,” then provides that “[c]ircuit courts may issue writs of mandamus, prohibition, quo warranto, *common law certiorari*, and habeas corpus, and all writs necessary to the complete exercise of the courts' jurisdiction.” (emphasis added).

“[T]he English common-law writ of certiorari was an original writ issuing out of chancery or the King's Bench, directing that an inferior tribunal return the record of a pending cause so that the higher court could review the proceedings.” *Haines City Cmty. Dev.*, 658 So. 2d at 525 (citing George E. Harris, *A Treatise on the Law of Certiorari* § 1 (1893)). In more modern use, common law certiorari has been described as a writ issued by an appellate court to a lower court in cases where an appeal was unavailable to direct that the record of the lower court be provided for review to the appellate court to determine whether the lower court has exceeded its jurisdiction or not proceeded according to law. *Haines City Cmty. Dev.*, 658 So. 2d at 525 (citing 3 Fla.Jur.2d *Appellate Review* § 456 (1978)).

The Florida Supreme Court has stated multiple times that a common law writ of certiorari is available to obtain review of quasi-judicial action of an administrative agency where no other method of appeal is available. See, e.g., *Codomo v. Shaw*, 99 So. 2d 849, 852 (Fla. 1958); *De Groot v. Sheffield*, 95 So. 2d 912, 915-16 (Fla. 1957); *State ex rel. Landis v. Simmons*, 140 So. 187, 190 (Fla. 1932); *Haines City Cmty. Dev.*, 658 So. 2d at 530; see also *G-W Dev.*, 317 So. 2d at 829-30. Florida Rule of Appellate Procedure 9.190(b)(3) expressly recognizes that certiorari is the appropriate remedy to review quasi-judicial action of an administrative agency where no other method of appeal is available. Fla. R. App. P. 9.190(b)(3) (“Review of quasi-judicial decisions of any administrative body, agency, board, or commission not subject to the Administrative Procedure Act must be commenced by filing a petition for certiorari in accordance with rules 9.100(b) \*191 and (c), unless judicial review by appeal is provided by general law.”); see also *Decker*, 85 So. 3d at 574.

Based on the foregoing, we conclude that Lightsey's remedy in this case is to seek review of the Commission's Final Order by writ of certiorari. However, as explained above, both district courts and circuit courts have the power to issue common law writs of certiorari. Therefore, we must determine which court was the appropriate court in which Lightsey should have sought certiorari review. We conclude that circuit court was the appropriate forum.

The Florida Supreme Court appears to have approved the filing of petitions to review administrative action of state agencies in circuit court. For example, the Florida Supreme Court has held that a petition for mandamus is an acceptable remedy for a prisoner seeking review of an order of the Florida Parole Commission. *Sheley v. Florida Parole Comm'n*, 720 So. 2d 216, 217 (Fla. 1998) (citing *Griffith v. Florida Parole and Probation Comm'n*, 485 So. 2d 818 (Fla. 1986)). In making that holding, the Florida Supreme Court stated that “[s]uch petitions are properly directed to the circuit courts.” *Id.* at 217. Additionally, in the case of local administrative action, the Florida Supreme Court has held that “a final administrative decision by a local administrative body is initially reviewable by certiorari to the circuit court.” *Decker*, 85 So. 3d at 574 (citing *Haines City Cmty. Dev.*, 658 So. 2d at 530); see also *Sheley v. Florida Parole Comm'n*, 703 So. 2d 1202, 1206 (Fla. 1st DCA 1997), *approved*, 720 So. 2d 216 (Fla. 1998). While neither of these examples is precisely on point – mandamus<sup>9</sup> is not certiorari and a local agency is not a state agency – we find them to be analogous and the best guidance that we have from the Florida Supreme Court.

We also note that in a case in which the Florida Supreme Court determined that both it and a circuit court possessed jurisdiction over a petition for writ of certiorari to review administrative action, the Court stated that “[a]s a matter of judicial administration,

this court will not ordinarily issue the writ of certiorari to review the rulings of an administrative board so long as a court of inferior jurisdiction is empowered to issue it.”<sup>10</sup> *Nat'l Dairy Prods. Corp. v. Odham*, 100 So. 2d 394, 395 (Fla. 1958). Heeding the Supreme Court's example, if we did possess concurrent jurisdiction with a circuit court over a petition for writ of certiorari, we would find it appropriate to decline such jurisdiction in favor of the circuit court. For one reason, the circuit court's decision on the petition will be reviewable by a district court on second-tier certiorari review, Fla. R. App. P. 9.030(b)(2)(B), while our decision on the petition would not be reviewable by the Florida Supreme Court unless one of the more limited bases for that Court's jurisdiction were satisfied. Fla. R. App. P. 9.030(a).

For these reasons, we hold that where a party seeks certiorari review of administrative action of the Commission acting pursuant to its constitutional authority, the appropriate court in which to seek such review is circuit court.

**\*192** We note that the First District faced an essentially identical question in *Decker*. In that case, a student sought judicial review in the First District Court of Appeal under the APA of an order entered by the University of West Florida (the “University”). *Decker*, 85 So. 3d at 573. Similar to this case, the First District found that the University was acting pursuant to its constitutional authority and that, therefore, the University was not an “agency” under the APA and the court lacked jurisdiction over a direct appeal of the University's order. *Id.* at 573. Also like us, the court determined that certiorari was the appropriate remedy and that both district courts and circuit courts possess the power to issue writs of certiorari. *Id.* at 574. The court then considered which court was the appropriate forum for seeking certiorari review and concluded that circuit court was the appropriate forum. *Id.*

Both this case and *Decker* involved the question of the proper court in which a party should seek certiorari review of quasi-judicial administrative action of a state constitutional entity that is not an “agency” under the APA. The only difference between *Decker* and this case is the entity involved – a University in *Decker* and the Commission in our case. Thus, we join the First District in concluding that where a party seeks certiorari review of quasi-judicial administrative action of a state constitutional entity that is not subject to the APA, the proper court in which to seek such review is the circuit court.

### Conclusion

The Florida Constitution grants district courts jurisdiction over direct appeals of administrative action when “prescribed by general law.” Art. V, § 4(b)(2), Fla. Const. There is no general law granting this court jurisdiction over a direct appeal of the administrative action taken by the Commission in this case. The APA, by its plain terms, does not grant us jurisdiction over this action because the Commission, when acting pursuant to constitutional authority, is not an “agency” and its actions are not “agency action” as defined by the APA.

The Commission has adopted procedures that incorporate the language of the APA, but the Commission's procedures are just that – the Commission's procedures. The Commission's procedures are not general law and cannot grant us jurisdiction over a direct appeal of administrative action. Additionally, even if the Commission had the power to and did “adopt the APA” to govern the procedures of the administrative proceeding conducted in this case, it was still the Constitution, not the APA, that granted the Commission the power that it exercised in enforcing the Fencing Rule. Therefore, even if the Commission was acting pursuant to the APA in conducting the administrative proceeding at issue in this case, the APA still would not grant us jurisdiction over this appeal.

However, as explained above, Rule 9.040(c) of the Florida Rules of Appellate Procedure provides that “[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought,” and Rule 9.040(b)(1) states that “[i]f a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court.” Applying these two rules, we treat the notice of appeal, which was timely filed with the agency clerk, as a petition for writ of certiorari and transfer the petition to the Circuit Court of Ninth Judicial Circuit in and for Osceola County, which is the county in which Lightsey's hunting preserve is **\*193** located.<sup>11</sup> § 47.011, Fla. Stat.

PETITION TRANSFERRED.

GANNAM and BROWNLEE, JJ., concur.

**All Citations**

413 So.3d 182, 49 Fla. L. Weekly D1482

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**Footnotes**

- 1 This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.
- 2 Article IV, section 9 includes one exception to the Commission's power to exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, which is that “all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law.”
- 3 The Predecessor Commission was merged into the Commission in 1999 after the voters of Florida enacted an amendment to article IV, section 9 of the Florida Constitution that created the Commission. Under the version of article IV, section 9 in effect prior to this constitutional amendment, the Predecessor Commission also exercised “the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life.” Art. IV, § 9, Fla. Const. (1974). The Predecessor Commission originally adopted the Fencing Rule, and the Commission maintained the rule after the Commission was created. The Commission last amended the Fencing Rule in 2018 when it amended the rule to change the specifications that a fence must meet in order to satisfy the rule.
- 4 Lightsey obtained annual licenses for its hunting preserve every year since at least some time in the 1970s, but the 1987 license is the license that Lightsey asserts contained a permanent exemption from the Fencing Rule.
- 5 As will be explained below, the administrative proceeding in this case was not actually conducted under the APA, but rather under the Commission's own procedures which incorporate the text of the APA but are not, in fact, the APA.
- 6 The parties' disagreement regarding whether the Commission possesses legal authority to grant exemptions to the Fencing Rule centers on whether the Commission is bound by section 120.542 of the APA, which concerns variances and waivers, in its enforcement of the Fencing Rule, as well as the proper interpretation of that section if the Commission is bound by it. Which party is correct about this issue is not material to this opinion given our determination that we lack jurisdiction to decide this appeal.
- 7 While the hearing officer accepted some evidence, he denied Lightsey's request for a formal hearing under section 120.57(1) and ultimately prohibited Lightsey from introducing most of the evidence that Lightsey attempted to introduce.
- 8 The parties dispute whether the Commission has adopted and is bound by section 120.542. *See* note 6, *supra*.
- 9 The First District noted in its *Sheley* opinion that certiorari, and not mandamus, may in fact be the more appropriate remedy for an inmate challenging the merits of an order of the Florida Parole Commission. 703 So. 2d at 1205, n.2.
- 10 In *National Dairy Products Corp.*, the Florida Supreme Court construed a prior version of the Florida Constitution.

11 By our transfer of this case to the Ninth Judicial Circuit Court in Osceola County, we express no view regarding whether once there the Commission may invoke the home venue privilege to transfer the case to the county in which the Commission maintains its headquarters. If the Commission attempts to invoke the home venue privilege, the circuit court may decide that issue in the first instance.

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412 So.3d 829

District Court of Appeal of Florida, Sixth District.

Carlos Lorenzo GONZALEZ, Appellant,

v.

STATE of Florida, Appellee.

Case No. 6D23-509

|

April 19, 2024

### Synopsis

**Background:** Defendant was convicted in the Circuit Court, 10th Judicial Circuit, Highlands County, Angela J. Cowden, J., of second-degree murder with a weapon. Defendant appealed.

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

instruction on justifiable homicide was warranted, and

trial court's error in declining to give requested instruction was not harmless.

Affirmed in part, reversed in part, and remanded.

Mize, J., concurred in result, with opinion.

**Procedural Posture(s):** Appellate Review; Trial or Guilt Phase Motion or Objection.

Appeal from the Circuit Court for Highlands County, Angela J. Cowden, Judge. Lower Tribunal No. 18-CF-306

### Attorneys and Law Firms

Howard L. "Rex" Dimmig, II, Public Defender, and Kevin Briggs, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Katherine Coombs Cline, Senior Assistant Attorney General, Tampa, for Appellee.

### Opinion

STARGEL, J.

**\*831** Carlos Lorenzo Gonzalez appeals his conviction for second-degree murder with a weapon.<sup>1</sup> Gonzalez argues that reversal is necessary because (1) the trial court erroneously denied his motion for judgment of acquittal when the State failed to present sufficient evidence to prove the intent element of second-degree murder, and (2) the trial court declined to instruct the jury on justifiable use of deadly force. We affirm the trial court's denial of the motion for judgment of acquittal without further discussion. As to Gonzalez's argument that the trial court erred by refusing to give the requested portion of the jury

**\*832** instruction on justifiable use of deadly force, we agree. While the evidence presented in support of Gonzalez's theory of the case was slight, we cannot find this error to be harmless because it goes to the heart of his theory of defense, and a jury could have found reasonable doubt under the requested instruction. Therefore, we reverse and remand for a new trial.

## I. Background

After Gonzalez was charged with the murder of Martin Zuniga (“Zuniga”), a jury trial was held wherein the State presented the testimony of Gonzalez’s wife, Ana Bosque; two detectives; a deputy sheriff; and the medical examiner. Gonzalez did not testify, nor did he present any witnesses. Bosque testified that Gonzalez and she were planning a move to Key West, so Gonzalez went to an agricultural store to find help with moving some boxes because of his recent pacemaker surgery. Gonzalez found two men who agreed to assist, one of whom was Zuniga, and after arriving back at the house, Gonzalez and the two men eventually began to drink beer together. Later, one of the men wanted to leave and Gonzalez drove him back to the store. Zuniga rode along.

After Gonzalez and Zuniga returned to the house, they continued drinking beer and rum. According to Bosque, Gonzalez and Zuniga were still drinking together when she went to bed around 8:00 p.m. Around 9:00 p.m., Gonzalez woke Bosque up so she could make sure Zuniga left the house because Gonzalez had asked him to leave. Bosque testified that Zuniga, who had been asleep on their couch, refused to leave, so she threatened to call the police; Zuniga was quiet and groggy, and she did not hear him say anything. Zuniga then struggled to walk to the door, and, instead of taking the porch stairs as Bosque instructed, he went the other way, fell off the porch, and landed on the ground outside.

Bosque decided to call 911 because she wanted someone to come get Zuniga out of her yard. She testified that it took law enforcement approximately fifteen minutes to arrive at her home. During those fifteen minutes, Gonzalez was outside. While she was waiting inside for the police, Bosque opened the front door and saw Gonzalez outside holding a butcher knife—one she recognized as coming from her kitchen drawer. When Gonzalez walked back inside, Bosque saw blood on the knife and made a second call to 911. She told the dispatcher, “I have this guy in my yard. He won’t leave. And he had a fight with my husband ....” She continued, “[H]e’s been—he’s laying down on my ground. I keep telling him to leave, but he won’t leave ... and he just started fighting. He was punching my husband.”

Bosque, who had not been drinking, testified that it appeared Gonzalez had been drinking, and he was “a little bit angry because,” he had told her, “the guy had punched him.” She acknowledged that she did not actually see nor hear any altercation even though the windows were open. After police arrived, Bosque saw Zuniga lying in the same place he had landed when he had fallen off the porch earlier.

Law enforcement found Zuniga in the front yard in a pool of blood with a stab wound in his chest. No weapons were found on or near Zuniga. The first deputy to arrive on scene asked Bosque what happened, and she stated, “My husband stabbed him.” Zuniga was transported by EMS to the hospital where he ultimately succumbed to his injuries.

Detective San Miguel testified as to Gonzalez’s statements to law enforcement. When questioned by police, Gonzalez indicated that he hired Zuniga and another man to help move boxes because he could **\*833** not lift heavy items due to a recent pacemaker implant surgery.<sup>2</sup> Gonzalez brought the men to his residence to show them the job, and they drank some beer. Gonzalez then took the other man back to the store, but Zuniga returned with Gonzalez because he wanted to drink more beer. Gonzalez believed Zuniga had also been drinking when he picked him up from the store. After drinking more beer and various liquors at Gonzalez’s residence, Zuniga wanted to stay the night on the couch, but Gonzalez refused, and Bosque told him to leave.

Gonzalez told police that Zuniga got up and walked out the door, but when Gonzalez went outside to make sure he was gone, Zuniga was sitting down, hiding under the porch. When Gonzalez again told Zuniga to leave, Zuniga punched him in the jaw, grabbed him by the throat, and threw him to the ground. Gonzalez went inside, grabbed the knife, and came back out to scare Zuniga off, but Zuniga was standing by a ladder and grabbed him by the throat again.

When Gonzalez was asked what he did after Zuniga grabbed him by the throat, Detective San Miguel stated that Gonzalez explained:

[H]e was grabbing him by the throat and grabbing him and punching him at the same time, whenever he had the knife in his hands, so he just went up and stabbed him. He said that – he said that his jaw was hurting from where he was getting punched. He said he didn't know what was up. It was like he was on something. He was just acting crazy. Just keeps saying he was laughing and crying and acting crazy. He swears on his grandmother's life that he had to stab him, because the guy was starting to choke him. He wouldn't let him go, and he would not leave.

Gonzalez later gave law enforcement different accounts of what led to Zuniga's stabbing. Gonzalez did not testify at trial, but his recorded statement given to the detectives while at the scene was played for the jury.

Law enforcement at the scene did not observe any injuries to Gonzalez, any grass or dirt on him, any signs of a struggle in the yard at any of the locations Gonzalez indicated an altercation took place, or any signs on Zuniga's hands indicating he had choked or punched anyone. An autopsy revealed that Zuniga's cause of death was a single eight-inch-deep stab wound to the chest. The medical examiner testified it would take “some force” to penetrate that deep in the middle of Zuniga's chest. The medical examiner further testified that Zuniga had no defensive wounds and, based on the “in and out” nature of the wound, was not moving when he was stabbed. However, Zuniga had a contusion on his head suggesting he had fallen backward which, according to the medical examiner, was consistent with him falling from the porch.

The medical examiner also testified that Zuniga's blood alcohol level was at least .335—more than four times the legal limit—at the time blood was drawn, which was at least ninety minutes after the stabbing. According to the medical examiner, a blood alcohol level of .335 would probably have rendered Zuniga comatose, unconscious, or asleep, and he would have had no purposeful movement. When asked whether Zuniga could have fallen and hit his head *after* being stabbed, the medical examiner stated, “He would not be walking \*834 with this level. I doubt that he [was] walking with this level[ ] of alcohol.”

## II. The Charge Conference and Jury Instructions

During the charge conference, the State, defense, and the trial judge agreed that Standard Jury Instruction 7.1, “Introduction to Homicide,” should be given to the jury. Defense counsel submitted a written request to have Standard Jury Instruction 3.6(f) read to the jury, but the written request simply included a printout of six pages of standard instructions for various scenarios—not a document with specific information for this case; however, during the charge conference, defense counsel stated that they were only asking the court to give the instructions on the first page. The first page, *in toto*, reads as follows:

It is a defense to the crime of second-degree murder with a weapon if the actions of (defendant) constituted the justifiable use of deadly force. “Deadly force” means force likely to cause death or great bodily harm. “Great bodily harm” means great as distinguished from slight, trivial, minor or moderate harm, and as such does not include mere bruises.

The use of deadly force is justifiable if defendant reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself while resisting any attempt to commit (applicable felony) upon him.<sup>3</sup>

The instruction then directs the trial court to provide the elements of the applicable felony that the victim is alleged to have attempted to commit. While there are more sections of Instruction 3.6(f) that may be applicable to the facts of this case, defense counsel only requested the first page of his submission be read to the jury.<sup>4</sup>

The trial judge denied Gonzalez's motion to give the requested portion of Instruction 3.6(f), finding that Instruction 7.1 contained sufficient instructions on the justifiable use of deadly force based on the testimony and evidence and that the requested portion of Instruction 3.6(f) would have been “duplicative.” Since Instruction 7.1 instructs that a homicide is justifiable “if necessarily

done while resisting an attempt to murder or commit a felony,” the trial court questioned defense \*835 counsel regarding the applicable felony Gonzalez asserted that Zuniga was attempting to commit against Gonzalez, and counsel responded that aggravated battery would be applicable. The prosecutor inquired whether the jury would be instructed that a punch to the face and/or grabbing of the throat is not a felony. Defense counsel indicated he believed that the packet of jury instructions, aside from his request for the portion of 3.6(f), was “sufficient” and he didn't want to “start adding issues that don't exist.” The trial court responded:

And I understand that as well, which is the reason I was concerned about using the justifiable use of deadly force, because the instruction requires the Court to insert the name and elements of the applicable felony, and a punch is a misdemeanor battery; a grabbing around the throat is a misdemeanor battery, because there is not any allegation that any weapon was used or that there was a loss of consciousness or that it reached the level of being a felony.

No additional instructions were given, although the parties were permitted to argue the differences between a battery and aggravated battery, provided they did not misstate the law.

At the conclusion of trial, the jury found Gonzalez guilty as charged of second-degree murder with a weapon. The trial court adjudicated Gonzalez guilty and sentenced him to life in prison.

### III. Analysis

The trial judge determined that Standard Jury Instruction 7.1 “fully encompasses the instruction to the jury so that they can understand Mr. Gonzalez's position that the killing was justifiable and lawful, if necessarily done while resisting an attempt to murder or commit a felony upon himself ... if that were what the jury believed.” Gonzalez argues that the trial court's decision to withhold the requested instruction on justifiable use of deadly force constituted reversible error because the given instruction on justifiable homicide did not identify the elements of the applicable felony, attempted aggravated battery.<sup>5</sup>

#### Justifiable Homicide and Legal Standard for Jury Instructions

“Florida law justifies the use of deadly force if someone ‘reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.’” *Jackson v. State*, 253 So. 3d 738, 740 (Fla. 1st DCA 2018) (citing Fla. Stat. § 776.012(2)). However, “[i]n most cases, a person in a fist fight lacks a sufficient justification to use deadly force.” *Jackson*, 253 So. 3d at 740. Attempted aggravated battery is a third-degree felony. *See* § 777.04(4)(d)1, Fla. Stat. (2017). Aggravated battery occurs when a person committing battery (1) intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or (2) uses a deadly weapon. § 784.045(1)(a), Fla. Stat. (2017). Here, because Zuniga was unarmed, the only way an attempted aggravated battery could have been committed \*836 upon Gonzalez was if Zuniga intentionally or knowingly attempted to cause great bodily harm.

“The question of self-defense is one of fact[ ] and is one for the jury to decide where the facts are disputed.” *Dias v. State*, 812 So. 2d 487, 491 (Fla. 4th DCA 2002). A trial court's decision to withhold “a proposed jury instruction is reviewed under the abuse of discretion standard of review.” *Aumuller v. State*, 944 So. 2d 1137, 1142 (Fla. 2d DCA 2006) (quoting *Bozeman v. State*, 714 So. 2d 570, 572 (Fla. 1st DCA 1998)). “Nevertheless, in a criminal proceeding, the trial court's discretion is limited by the defendant's right to have the jury instructed on any valid theory of defense supported by record evidence.” *Cliff Berry Inc. v. State*, 116 So. 3d 394 (Fla. 3d DCA 2012) (citing *Coday v. State*, 946 So. 2d 988, 994 (Fla. 2006)). “[A] defendant is ‘entitled to a jury instruction on his theory of the case if there is *any* evidence to support it,’ no matter how flimsy that evidence might

be.” *Wright v. State*, 705 So. 2d 102, 104 (Fla. 4th DCA 1998) (quoting *Garramone v. State*, 636 So. 2d 869, 870 (Fla. 4th DCA 1994)). While “[a] trial court is accorded broad discretion in formulating appropriate jury instructions,” *Barton Protective Svcs., Inc. v. Faber*, 745 So. 2d 968, 974 (Fla. 4th DCA 1999), the “failure to give a requested instruction constitutes reversible error if: (1) the requested instruction accurately states the law; (2) the facts of the case support the instruction; and (3) the instruction is necessary to allow the jury to properly resolve all issues in the case.” *Elder v. State*, 296 So. 3d 440 (Fla. 4th DCA 2020) (citing *Campbell v. State*, 812 So. 2d 540, 544 (Fla. 4th DCA 2002)).

“In determining whether to give the requested instruction, the trial court should consider the evidence in the main case without weighing the evidence.” *Rockerman v. State*, 773 So. 2d 602, 603 (Fla. 1st DCA 2000). “The proper test is whether the charge as a whole adequately presents the law upon the issues.” *Kuba v. Leb*, 464 So. 2d 601, 602 (Fla. 3d DCA 1985). “Reversible error occurs when an instruction is not only an erroneous or incomplete statement of the law, but is also confusing or misleading.” *Dockswell v. Bethesda Mem’l Hosp.*, 210 So. 3d 1201, 1214 (Fla. 2017) (quoting *Gross v. Lyons*, 721 So. 2d 304, 306 (Fla. 4th DCA 1998)).

Further, to warrant a self-defense instruction, “the defendant does not have to testify at trial; his or her statement to the police admitted into evidence may be sufficient.” *Sipple v. State*, 972 So. 2d 912, 916 (Fla. 5th DCA 2007). “[I]f a jury can reasonably infer from circumstantial evidence presented at trial that the defendant had the state of mind necessary for self-defense, then the defendant is entitled to a jury instruction on self-defense.” *Spurgeon v. State*, 114 So. 3d 1042, 1047 (Fla. 5th DCA 2013) (citing *Johnson v. State*, 634 So. 2d 1144, 1145 (Fla. 4th DCA 1994)).

### Justifiable Homicide's Application to this Case

The key differences between Standard Jury Instruction 7.1 and Standard Jury Instruction 3.6(f) are as follows: Instruction 7.1 states that “[t]he killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant,” whereas the requested portion of Instruction 3.6(f) states, in pertinent part: “The use of deadly force is justifiable *if defendant reasonably believed* that the force was necessary to prevent imminent death or great bodily harm to himself while resisting any attempt to commit (applicable felony) upon him.” (Emphasis added). The requested portion of Instruction 3.6(f) also includes the elements \*837 of aggravated battery as the applicable attempted felony.

Under the facts of this case, Standard Jury Instruction 7.1, on its own, was not a complete statement of the applicable law concerning the justifiable use of deadly force. If read alone, Instruction 7.1 could be understood to ask the jury to determine whether the defendant was *actually* resisting an attempt to murder or commit a felony upon him rather than whether the defendant *reasonably believed* that such force was necessary to prevent imminent death or great bodily harm. Further, if the requested instruction would have been given, the jury would have also had to determine whether Zuniga's acts of punching, grabbing by the throat, or “starting to choke” Gonzalez constituted an attempt to commit an aggravated battery. Accordingly, Standard Jury Instruction 7.1 is not duplicative of the requested portion of Standard Jury Instruction 3.6(f). In fact, under the circumstances of this case, Instruction 7.1, on its own without being read together with Instruction 3.6(f), could possibly confuse or mislead the jury as to the issue of the justifiable use of deadly force.

Gonzalez's statements to police, though inconsistent, alleged that Zuniga punched him and grabbed him by the throat, and at one point, started to choke him. Additionally, there was testimony that Gonzalez recently had surgery to insert a pacemaker, which would likely place him at a disadvantage in a physical altercation. See *Montijo v. State*, 61 So. 3d 424, 427 (Fla. 5th DCA 2011) (justifiable use of deadly force instruction based on aggravated battery was merited where victim was a large individual who followed defendant to restaurant parking lot after road rage incident and was aggressive during the confrontation); *Priestley v. State*, 537 So. 2d 690, 691 (Fla. 2d DCA 1989) (noting trial court's decision to give justifiable use of deadly force instruction based on attempted aggravated battery where victim, who was younger and physically fit, knocked defendant down and repeatedly hit defendant while on top of him).<sup>6</sup> Given Gonzalez's presumed heightened state of physical vulnerability and his

testimony that Zuniga was starting to choke him, we find that the evidence produced at trial, though slight, was sufficient to entitle Gonzalez to the requested portion of Standard Jury Instruction 3.6(f), and the trial court erred when it denied same.

### Harmless Error Analysis

Having determined it was error to refuse to give the requested portion of Standard Jury Instruction 3.6(f), it is necessary to determine whether such error was harmless. *See State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986) (“The harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to \*838 the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.”). “The harmless error analysis is applicable to jury instructions.” *Vila v. State*, 74 So. 3d at 1113 (citing *Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714 (Fla. 3d DCA 1972)). “[T]he question the harmless error test asks—whether there is a reasonable possibility the error contributed to the verdict—is ultimately dependent on the individual facts of each case.” *Bullington v. State*, 311 So. 3d 102, 111 (Fla. 2d DCA 2020).

The defense did not put on any testimony or introduce any evidence to refute the State's allegations. The only evidence that supported the defense's theory of the case is Gonzalez's recorded statement given to law enforcement at the scene wherein he provided conflicting and varying versions of how, where, and why the stabbing occurred.

During closing arguments, defense counsel advised the jury that Gonzalez felt he could have been killed or endured great bodily harm, and he had to stab Zuniga because he was defending himself. Counsel further argued that Gonzalez definitely felt his life was in danger because Zuniga was choking him, and he reminded the jury to consider the fact that Gonzalez had recently had a pacemaker implanted. Notwithstanding the remoteness that a different result may occur, our courts have long held that the “[f]ailure to give a standard jury instruction is reversible error when the omitted standard jury instruction goes to the heart of the defendant's case.” *Arboleda v. State*, 645 So. 2d 48, 50 (Fla. 3d DCA 1994).

### IV. Conclusion

While the evidence warranting the requested portion of Standard Jury Instruction 3.6(f) was slight, it was nevertheless sufficient. We find that the error in refusing to give the requested portion of the instruction goes to the heart of Gonzalez's theory of defense and was not harmless beyond a reasonable doubt. Therefore, we reverse the judgment and sentence and remand for a new trial.

REVERSED and REMANDED.

WOZNIAK, J., concurs.

MIZE, J., concurring in result, with opinion.

MIZE, J., concurs in result, with opinion.

I concur in the result reached in this case, which is to reverse Gonzalez's conviction and remand for a new trial. I would say more than the majority, and I emphasize three points specifically.

### **I. A defendant is entitled to a jury instruction on self-defense as a matter of right if there is any evidence at all to support the instruction.**

“Generally, a trial court's decision to give or withhold a proposed jury instruction is reviewed for an abuse of discretion.” *Vila v. State*, 74 So. 3d 1110, 1112 (Fla. 5th DCA 2011). “However, in a criminal proceeding, the trial court's discretion is narrower because a criminal defendant is entitled to have the jury instructed on his or her theory of defense if there is any evidence to

support the theory and the theory is recognized as valid under Florida law.” *Id.* “The trial court should not weigh the evidence when determining whether to give the requested instruction.” *Spurgeon v. State*, 114 So. 3d 1042, 1047 (Fla. 5th DCA 2013). “The jury—not the trial judge—decides the weight of the evidence.” *Id.*; *see also Vila*, 74 So. 3d at 1112 (“In determining whether to give a requested instruction, the trial court should consider the evidence presented without \*839 weighing the evidence, as the latter is a task for the jury.”); *Elder v. State*, 296 So. 3d 440, 444 (Fla. 4th DCA 2020) (“In deciding whether to give a requested charge, a trial judge may not weigh the evidence before him in determining whether the instruction is appropriate; it is enough if the defense is *suggested* by the evidence presented. However disdainful the trial judge may feel about the merits of the defense from a factual standpoint is beside the point.” (emphasis in original) (internal quotations, citations omitted)). “A criminal defendant is entitled to have the jury instructed on the law applicable to his or her theory of defense where there is *any* evidence to support it, no matter how weak or flimsy.” *Elder*, 296 So. 3d at 444 (quoting *Gregory v. State*, 937 So. 2d 180, 182 (Fla. 4th DCA 2006) (emphasis in original)).

In the specific context of self-defense, Florida's courts have repeatedly recognized that “[t]he question of self-defense is one of fact, and is one for the jury to decide where the facts are disputed.” *Vila*, 74 So. 3d at 1112 (quoting *Dias v. State*, 812 So. 2d 487, 491 (Fla. 4th DCA 2002)); *see also Radler v. State*, 290 So. 3d 87, 91 (Fla. 4th DCA 2020); *Spurgeon*, 114 So. 3d at 1047. “If there is any evidence to support a theory of self-defense, the trial court should give the requested instruction however flimsy the evidence is which supports that theory or however weak or improbable the testimony may have been.” *Wagers v. State*, 199 So. 3d 1116, 1117 (Fla. 5th DCA 2016) (quoting *Arthur v. State*, 717 So. 2d 193, 194 (Fla. 5th DCA 1998) (internal quotations, alterations omitted)); *see also Taylor v. State*, 410 So. 2d 1358, 1359 (Fla. 1st DCA 1982) (“A defendant is entitled to his requested self-defense instruction regardless of how weak or improbable his testimony may have been with respect to the circumstances leading up to the battery.”); *Wright v. State*, 705 So. 2d 102, 104 (Fla. 4th DCA 1998) (“[I]t is not the *quantum* or the *quality* of the proof as to self-defense that determines the requirement for giving the charge. If *any* evidence of a substantial character is adduced ... the element of self-defense becomes an issue, and the jury, as the trier of the facts, should be duly charged as to the law thereon, because it is the jury's function to determine that issue.” (quoting *Kilgore v. State*, 271 So. 2d 148, 152 (Fla. 2d DCA 1972)) (emphasis in original); *Radler*, 290 So. 3d at 91-92 (holding that even if there was no evidence of an overt act which could reasonably have caused the defendant to fear that he would be subject to great bodily harm, the combination of activities observed by the defendant prior to his use of deadly force could provide sufficient evidence that the defendant reasonably believed that he was in danger of great bodily harm such that the defendant was entitled to a jury instruction on self-defense). “Where evidence presented at trial supports an instruction on self-defense (use of deadly force as well as non-deadly force), it is error not to give it.” *Curington v. State*, 704 So. 2d 1137, 1140 (Fla. 5th DCA 1998).

Additionally, in assessing whether there is any evidence to support a theory of self-defense, no particular type of evidence is required. “[A] defendant is not required to testify at trial to receive a jury instruction on self-defense.” *Spurgeon*, 114 So. 3d at 1047; *see also Wright*, 705 So. 2d at 104 (“To raise self-defense, a defendant does not have to testify directly about his intent behind an act occurring in the past, or that he made a conscious decision to defend himself in a certain way.”). “A defendant's statements admitted into evidence at trial may be sufficient evidence for a self-defense instruction. The cross-examination of State witnesses can also support a claim of self-defense.” \*840 *Spurgeon*, 114 So. 3d at 1047; *see also Jefferson v. State*, 264 So. 3d 1019, 1028 (Fla. 2d DCA 2018). “Finally, if a jury can reasonably infer from circumstantial evidence presented at trial that the defendant had the state of mind necessary for self-defense, then the defendant is entitled to a jury instruction on self-defense.” *Spurgeon*, 114 So. 3d at 1047 (citing *Johnson v. State*, 634 So. 2d 1144, 1145 (Fla. 4th DCA 1994)); *see also Jefferson*, 264 So. 3d at 1028.

In this case, as the majority opinion states, the evidence produced at trial was sufficient to entitle Gonzalez to an instruction regarding self-defense. Gonzalez's statement given to police at the scene, if given credence by the jury, could have served as a basis for the jury to find that a reasonable doubt existed as to whether Gonzalez acted in lawful self-defense.

## **II. Standard Jury Instruction 7.1 is not a substitute for a trial court giving the entirety of all applicable portions of Standard Jury Instruction 3.6(f).**

When there is any evidence to support a theory of self-defense, the trial court must give an instruction on self-defense and that instruction must be an accurate statement of the law.

“[T]he yard stick by which jury instructions are measured is clarity, for jurors must understand fully the law that they are expected to apply fairly.” *State v. Floyd*, 186 So. 3d 1013, 1018 (Fla. 2016) (quoting *Perriman v. State*, 731 So. 2d 1243, 1246 (Fla. 1999)). “[T]rial courts should not give instructions that are confusing, contradictory, or misleading.” *Floyd*, 186 So. 3d at 1018 (citing *Butler v. State*, 493 So. 2d 451, 452 (Fla. 1986)). “[W]here an instruction is confusing or misleading, prejudicial error occurs where the jury might reasonably have been misled and the instruction caused them to arrive at a conclusion that it otherwise would not have reached.” *Brown v. State*, 11 So. 3d 428, 432 (Fla. 2d DCA 2009), *approved sub nom. Gutierrez v. State*, 177 So. 3d 226 (Fla. 2015) (quoting *Tinker v. State*, 784 So. 2d 1198, 1200 (Fla. 2d DCA 2001)); *Barthelemy v. Safeco Ins. Co. of Ill.*, 257 So. 3d 1029, 1031 (Fla. 4th DCA 2018) (“Reversible error occurs when an instruction is not only an erroneous or incomplete statement of the law, but is also confusing or misleading.” (quoting *Gross v. Lyons*, 721 So. 2d 304, 306 (Fla. 4th DCA 1998))).

Applying the foregoing standard, it is clear that Standard Jury Instruction 7.1 is never a substitute for a trial court giving the entirety of all portions of Standard Jury Instruction 3.6(f) applicable to a particular case. The differences between the two instructions are enormous, and Standard Jury Instruction 7.1 is never sufficient in a case in which a jury instruction on self-defense is warranted. Comparing the two instructions as they applied in this case illustrates the point well.

Standard Jury Instruction 7.1 includes only a brief introduction to Justifiable Homicide. Specifically, Standard Jury Instruction 7.1 states, in pertinent part:

The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant was at the time of the killing.

Standard Jury Instruction 3.6(f), which is the primary standard jury instruction concerning the Justifiable Use of Deadly Force, includes significantly more information. Instruction 3.6(f) provides in pertinent part:

It is a defense to the crime of second-degree murder with a weapon if the \*841 actions of (defendant) constituted the justifiable use of deadly force. “Deadly force” means force likely to cause death or great bodily harm. “Great bodily harm” means great as distinguished from slight, trivial, minor or moderate harm, and as such does not include mere bruises.

The use of deadly force is justifiable if defendant reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself while resisting any attempt to commit (applicable felony) upon him.<sup>7</sup>

The instruction then calls for the trial court to provide the elements of the applicable felony that the defendant alleges the victim attempted to commit. Instruction 3.6(f) then continues:

(Defendant) was justified in using deadly force if he reasonably believed that such force was necessary to prevent imminent death or great bodily harm to himself or the imminent commission of (applicable forcible felony listed in § 776.08, Fla. Stat.) against himself. If defendant was not otherwise engaged

in criminal activity and was in a place he had a right to be, then he had no duty to retreat and had the right to stand his ground.<sup>8</sup>

The instruction then calls for the trial court to provide the elements of the applicable felony that the defendant alleges the victim was about to commit, if applicable. The instruction then continues:

In deciding whether defendant was justified in the use of deadly force, you must consider the circumstances by which he was surrounded at the time the force was used. The danger need not have been actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, defendant must have actually believed that the danger was real. However, the defendant had no duty to retreat if he was not otherwise engaged in criminal activity and was in a place where he had a right to be.

After other portions of Standard Jury Instruction 3.6(f) that are not relevant to this case, the instruction continues as follows:

If you find that (defendant), who because of threats or prior difficulties with (victim), had reasonable grounds to believe that he was in danger of death or great bodily harm at the hands of victim, you may consider this fact in determining whether the actions of (defendant) were those of a reasonable person.

If you find that at the time of the alleged second-degree murder with a weapon, (defendant) knew that (victim) had committed an act or acts of violence, **\*842** you may consider that fact in determining whether (defendant) reasonably believed it was necessary for him to use deadly force.

In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of (defendant) and (victim).

If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether (defendant) was justified in the use of deadly force, you should find him not guilty.

However, if from the evidence you are convinced beyond a reasonable doubt that (defendant) was not justified in the use of deadly force, you should find him guilty if all of the elements of the charge have been proved.

To understand why Standard Jury Instruction 3.6(f) is required and Standard Jury Instruction 7.1 is woefully inadequate, it is useful to set forth the applicable law concerning the justifiable use of deadly force. The Florida Statutes contain multiple provisions concerning the use of deadly force in self-defense, three of which are relevant to this case. First, Section 776.012, Florida Statutes, entitled “Use or threatened use of force in defense of person,” provides in pertinent part:

A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

§ 776.012(2), Fla. Stat. (2014). Section 776.031, Florida Statutes, entitled “Use or threatened use of force in defense of property,” provides in pertinent part:

A person is justified in using or threatening to use deadly force only if he or she reasonably believes that such conduct is necessary to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

§ 776.031(2), Fla. Stat. (2014). Finally, within Chapter 782 of the Florida Statutes, which governs homicide, Section 782.02, entitled “Justifiable use of deadly force,” provides:

The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or her or upon or in any dwelling house in which such person shall be.

§ 782.02, Fla. Stat. (1997).

Each of these statutes provides a separate possible legal basis upon which the use of deadly force may be justified. Both sections 776.012(2) and 776.031(2) apply when a person “reasonably believes” that certain circumstances are present. In the case of section 776.012(2), the person must reasonably believe “that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.” In the case of section 776.031(2), the person must reasonably believe “that such conduct is necessary to prevent the \*843 imminent commission of a forcible felony.” Because these statutes apply when a person “reasonably believes” that the required circumstances are present, Florida courts have made clear that while reasonableness is an objective standard, whether the person's belief was objectively reasonable must be determined from the point of view of the person at the time the person used the deadly force. *See Oquendo v. State*, 357 So. 3d 214, 217 (Fla. 2d DCA 2023) (“The conduct of a person acting in self defense is measured by an objective standard, but the standard must be applied to the facts and circumstances as they appeared at the time of the altercation to the one acting in self defense.” (quoting *Shreiteh v. State*, 987 So. 2d 761, 763 (Fla. 4th DCA 2008))); *State v. Quevedo*, 357 So. 3d 1249, 1253 (Fla. 3d DCA 2023) (“Thus the objective standard of what is reasonable must be measured in light of the facts and circumstances as they appeared and were known to the individual defendant.”); *Cummings v. State*, 310 So. 3d 155, 158 (Fla. 2d DCA 2021) (“The question under this objective evaluation of a defendant's conduct is whether, based on the circumstances as they appeared to the defendant at the time of the altercation, a reasonable and prudent person in the same position as the defendant would believe that the use of deadly force is necessary to prevent imminent death or great bodily harm or the imminent commission of a forcible felony.” (quoting *Bouie v. State*, 292 So. 3d 471, 481 (Fla. 2d DCA 2020))); *Viera v. State*, 163 So. 3d 602, 604 (Fla. 3d DCA 2015) (“[T]he objective standard ... requires the court to determine whether, based on circumstances as they appeared to the defendant when he or she acted, a reasonable and prudent person situated in the same circumstances and knowing what the defendant knew would have used the same force as did the defendant.”); *Mobley v. State*, 132 So. 3d 1160, 1164–65 (Fla. 3d DCA 2014) (“That standard requires the court to determine whether, based on circumstances as they appeared to the defendant when he or she acted, a reasonable and prudent person situated in the same circumstances and knowing what the defendant knew would have used the same force as did the defendant.”); *Price v. Gray's Guard Serv., Inc.*, 298 So. 2d 461, 464 (Fla. 1st DCA 1974) (“The conduct of a person acting in self defense is measured by an objective standard, but the standard must be applied to the facts and circumstances as they appeared at the time of the altercation to the one acting in self defense. A person acting in self defense is not held to the same

course of conduct which might have been expected had he been afforded an opportunity of cool thought as to possibilities, probabilities and alternatives.”).

At the charging conference in this case, the trial judge repeatedly questioned Gonzalez's counsel regarding what applicable felony Gonzalez asserted that Zuniga was attempting to commit against Gonzalez. However, the commission of a felony against Gonzalez was not the only circumstance which could have justified his use of deadly force. As explained above, section 776.012(2), Florida Statutes, provides that “[a] person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.” (emphasis added). Therefore, if Gonzalez reasonably believed that using deadly force was necessary to prevent death or great bodily harm to himself, he was justified in using deadly force to prevent such harm whether or not Zuniga was attempting to commit a forcible felony against Gonzalez. If Gonzalez reasonably **\*844** believed that using deadly force was necessary to prevent the imminent commission of a forcible felony, that could provide an additional or alternative justification for the use of deadly force, but a reasonable belief that deadly force was necessary to prevent the commission of a forcible felony is not necessary where the defendant had a reasonable belief that using deadly force was necessary to prevent death or great bodily harm to himself.

Moreover, whether Gonzalez had a reasonable belief that using deadly force was necessary to prevent death or great bodily harm to himself was required to be judged from Gonzalez's perspective at the time that he stabbed Zuniga. In this case, Gonzalez told police that: (1) Zuniga grabbed Gonzalez by the throat and punched Gonzalez in the jaw multiple times; (2) Zuniga was choking Gonzalez and would not let go; and (3) due to Zuniga choking and beating Gonzalez, he had to stab Zuniga to defend himself. At this time, Gonzalez was also in a reduced physical capacity and a heightened state of physical vulnerability after having recently had surgery and having a pacemaker installed in his heart. In determining whether a reasonable doubt existed as to whether Gonzalez's belief was reasonable, the jury was entitled to take into account the relative physical abilities of Gonzalez and Zuniga because Gonzalez's reduced physical capacity and heightened vulnerability to physical harm were known to Gonzalez at the time that he stabbed Zuniga. *See* Fla. Std. Crim. Jury Instr. 3.6(f) (“In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of (defendant) and (victim).”); *Floyd*, 186 So. 3d at 1020–21 (holding that Standard Jury Instruction 3.6(f) correctly states the law regarding the justifiable use of deadly force). Given Gonzalez's heightened state of physical vulnerability and his testimony that Zuniga was grabbing him by the throat, choking him, punching him in the jaw and beating him, a jury could have concluded that a reasonable doubt existed as to whether Gonzalez possessed a reasonable belief that his use of deadly force was necessary to prevent death or great bodily harm to himself.

As noted in the majority opinion, the trial judge recognized at the charging conference that Gonzalez was entitled to an instruction on the justifiable use of deadly force, but the trial judge determined that Standard Jury Instruction 7.1 was an accurate statement of the law regarding the justifiable use of deadly force and that Standard Jury Instruction 3.6(f) would have been duplicative. This was error, because on its own, Standard Jury Instruction 7.1 was not an accurate statement of the applicable law concerning the justifiable use of deadly force and, in fact, was incomplete, confusing and misleading.

The differences between Standard Jury Instruction 7.1 and Standard Jury Instruction 3.6(f), and the deficiencies in Instruction 7.1, are obvious from even a cursory reading of both instructions. To begin with, Instruction 7.1 does not instruct the jury, in accordance with the statutes detailed above, that a person is justified in using deadly force if the person reasonably believes that deadly force is necessary to prevent imminent death<sup>9</sup> or great bodily harm to himself.

Additionally, unlike Instruction 3.6(f), Instruction 7.1 does not inform the jury that the issue of self-defense is determined from the point of view of the defendant at **\*845** the time the defendant used deadly force, including taking into account the relative physical differences between the two parties that were known to the defendant when the defendant used deadly force. On its own, without being read together with Instruction 3.6(f), Instruction 7.1 in fact could be read to instruct the jury that the issue of self-defense is not determined from the point of view of the defendant. Instruction 7.1 states that “[t]he killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the

defendant.” This instruction could be understood to ask the jury to determine whether the defendant was actually resisting a murder or felony rather than whether the defendant reasonably believed that he was resisting a murder or felony.<sup>10</sup>

Instruction 7.1 also fails to inform the jury that Gonzalez had no duty to retreat if he was not otherwise engaged in criminal activity and was in a place he had a right to be. In fact, Instruction 7.1 could be read to imply that Gonzalez did have a duty to retreat. Again, Instruction 7.1 states that “[t]he killing of a human being is justifiable homicide and lawful if *necessarily* done while resisting an attempt to murder or commit a felony upon the defendant.” (emphasis added). The use of the term “necessarily” in Instruction 7.1, without being read together with Instruction 3.6(f), could have caused the jury to conclude that Gonzalez had a duty to retreat because his use of deadly force was not necessary if he had the ability to retreat in safety.

For all of these reasons, Standard Jury Instruction 7.1 was not an accurate statement of the law of self-defense as it applied to this case.

### III. Gonzalez did not forfeit his right to self-defense by exiting his house to confront Zuniga with a knife.

I discuss this point separately to highlight its importance. In addition to all of the foregoing reasons that Instruction 7.1 was inadequate, the use of the word “necessarily” in Instruction 7.1 could also have led the jury to believe that the fact that Gonzalez went into his house and came back out of the house with a knife to confront Zuniga negated Gonzalez's right to use deadly force. After all, it was not “necessary” for Gonzalez to come back out of his house armed with a knife after he had safely retreated into his home. However, under the United States Constitution and the laws of the State of Florida, Gonzalez was not required to stay in his home while Zuniga trespassed on Gonzalez's property. Gonzalez was entitled to confront Zuniga as a trespasser. Gonzalez going into his house and coming back out to confront Zuniga with a knife did not negate Gonzalez's right to use deadly force if he had a reasonable belief that such force was necessary to prevent death or great bodily harm to himself.

The United States Constitution guarantees an individual right to keep and bear arms. *D.C. v. Heller*, 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). “Central to this right, as the Supreme Court explained in *Heller*, is the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Burns v. State*, 361 So. 3d 372, 376 (Fla. 4th DCA 2023) (quoting *Heller*, 554 U.S. at 635, 128 S.Ct. 2783 (internal quotations omitted)).

\*846 Knives are arms. See *State v. Montalvo*, 229 N.J. 300, 162 A.3d 270, 284 (2017); *State v. DeCiccio*, 315 Conn. 79, 105 A.3d 165, 190-97 (2014); David B. Kopel, Clayton E. Cramer, & Joseph Edward Olson, *Knives and the Second Amendment*, 47 U. Mich. J. L. Reform 167, 214 (2013).

Florida grants an individual state constitutional right to bear arms, Art I, § 8(a), Fla. Const., and also an explicit statutory right to “own, possess and lawfully use ... weapons,” including knives, at a person's “home or place of business” without any restriction against the open carrying of such weapons or any requirement to obtain a permit. § 790.25(3)(n), Fla. Stat. (2006)<sup>11</sup>; § 790.001(13), Fla. Stat. (2016) (defining “weapon” for purposes of Chapter 790, Florida Statutes, to include knives)<sup>12</sup>; see also *Burns*, 361 So. 3d at 377. Thus, an individual in Florida has an explicit statutory right to openly carry a knife (or firearm) on his or her own home property.

Pursuant to Section 790.25(3)(n) and the Constitutions of Florida and the United States, Gonzalez had the right to openly carry his knife on his own home property as he demanded that Zuniga leave his property. Additionally, once Zuniga refused to leave Gonzalez's property after being asked to do so, Zuniga became a trespasser, thereby justifying Gonzalez's right to use non-deadly force, including his constitutional and statutory right to openly carry or display his knife, to assist him in terminating the trespass. See *Burns*, 361 So. 3d at 377 (citing § 776.031(1), Fla. Stat. (2020) (justifying the use or threatened use of non-deadly force, “when and to the extent” necessary, “to prevent or terminate” another's “trespass on” the non-dwelling portions of one's “real” or “personal property”)); *Howard v. State*, 698 So. 2d 923, 925 (Fla. 4th DCA 1997) (holding that the display of a knife,

without more, is non-deadly force, not deadly force); *see also* *Cunningham v. State*, 159 So. 3d 275, 277 (Fla. 4th DCA 2015) (stating that, as a matter of law, “the mere display of a gun is not deadly force.” (emphasis in original)).

While it certainly may not have been advisable for Gonzalez to go back outside with a knife after he had already safely entered his home, he was within his legal rights to do so and he did not forfeit his legal right to use deadly force if he had a reasonable belief that such force was necessary to prevent death or great bodily harm to himself. What actually happened after Gonzalez went back outside and whether Gonzalez had a reasonable belief that his use of deadly force was necessary to prevent death or great bodily harm to himself or the commission of a felony against himself was a question for the jury to resolve after being properly instructed on the justifiable use of deadly force, which Standard Jury Instruction 7.1 did not accomplish.

#### IV. Conclusion.

Gonzalez was entitled to a jury instruction concerning self-defense as a matter of right because there was evidence in the record to support a theory of self-defense. \*847 The standard jury instruction approved by the Florida Supreme Court for self-defense is Instruction 3.6(f), and the trial court erred by failing to give it. Standard Jury Instruction 7.1 is not “duplicative” of Standard Jury Instruction 3.6(f). In fact, Instruction 7.1, on its own without being read together with Instruction 3.6(f), is woefully inadequate. Standard Jury Instruction 3.6(f) provides a complete and accurate instruction regarding the justifiable use of deadly force, and trial courts err by refusing to give the instruction in cases in which there is any evidence to support a theory of self-defense. Accordingly, I concur in the result reached in this case, which is to reverse Gonzalez’s conviction and remand this case to the trial court to conduct a new trial. On remand, if the complete Standard Jury Instruction 3.6(f) is requested, it should be given.

#### All Citations

412 So.3d 829, 49 Fla. L. Weekly D878

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#### Footnotes

- 1 This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.
- 2 Gonzalez’s interview with police was done with Detective San Miguel, who provided Spanish translation.
- 3 This is the applicable version of Standard Jury Instruction 3.6(f) that was in effect at the time of Gonzalez’s trial. This section is based on section 782.02, Florida Statutes (1997), and the applicable felony Zuniga was allegedly attempting to commit was aggravated battery.
- 4 While Gonzalez makes additional arguments that other portions of Standard Jury Instruction 3.6(f) were applicable to his case and should have been given, as noted above, defense counsel specifically advised the trial court that he only sought the instructions on the first page of his written submission of the requested instruction. Because no other portions of the instruction were requested during the charge conference, and Gonzalez does not raise fundamental error, those additional arguments are unpreserved for appellate review. *See Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) (“Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. Furthermore, in order for an argument to be cognizable on appeal, it must have been the specific contention asserted as legal ground for the objection, exception, or motion below.” (citations omitted)). Moreover, even assuming the trial court had given the requested portion of the Instruction 3.6(f), Gonzalez waived any error in the failure to give the remainder of the instruction. *See Armstrong v. State*, 579 So. 2d 734, 735 (Fla. 1991) (holding that by affirmatively

requesting an abbreviated instruction on excusable homicide, which the trial court gave, the defendant waived any claim of error in the instruction).

5 Gonzalez argues that the trial court also erred by failing to give an instruction on the duty to retreat. However, defense counsel specifically advised the trial court that Gonzalez only sought the instructions on the first page of his written submission of the requested instruction, which did not include language on the duty to retreat. Because that instruction was not requested during the charge conference, this argument is unpreserved. *See Steinhorst*, 412 So. 2d at 338.

6 We recognize that the full Instruction 3.6(f) includes the following: “In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of (defendant) and (victim).” However, that portion of the instruction was not requested. Nevertheless, the relative physical abilities of Gonzalez and Zuniga would be relevant to the jury's determination of whether Gonzalez “reasonably believed” that the use of deadly force was necessary.

The question under this objective evaluation of a defendant's conduct is whether, based on the circumstances as they appeared to the defendant at the time of the altercation, a reasonable and prudent person in the same position as the defendant would believe that the use of deadly force is necessary to prevent ... the imminent commission of a forcible felony.

*Bouie v. State*, 292 So. 3d 471, 481 (Fla. 2d DCA 2020) (citing *Garcia v. State*, 286 So. 3d 348 (Fla. 2d DCA 2019)).

7 This is the version of Standard Jury Instruction 3.6(f) that was in effect at the time of Gonzalez's trial. Instruction 3.6(f) has since been amended slightly, but none of the amendments are material to this case. The instruction is stated as it would have been read at trial given the circumstances of this case. This portion of the instruction is based on section 782.02, Florida Statutes (1997). The applicable felony that Gonzalez argued that Zuniga attempted to commit was aggravated battery.

8 This portion of the instruction is based on sections 776.012(2) and 776.031(2), Florida Statutes (2014). The Standard Instruction states that this portion of the instruction applies when the defendant is not in a dwelling or residence or when the defendant was in a dwelling or residence but had no right to be there. In this case, the altercation occurred on Gonzalez's property but not in a dwelling. There are other portions of Standard Jury Instruction 3.6(f) that are not relevant to this case.

9 While Instruction 7.1 references “murder,” “murder” is a narrower category than “death.” A person who commits voluntary manslaughter imposes death on the victim but does not commit “murder.”

10 Also, as explained above, resisting a murder or felony are not the only justifications for the use of deadly force.

11 This is the version of the statute that was in effect on the night of the incident at issue in this case. Section 790.25 has since been amended but the statutory right of an individual to “own, possess and lawfully use ... weapons” at a person's “home or place of business” remains in subsection 2(n) of the amended statute.

12 This is the version of the statute that was in effect on the night of the incident at issue in this case. Section 790.001 has since been amended, but the definition of “weapon” has not changed. *See* § 790.001(20), Fla. Stat. (2023).

395 So.3d 1127

District Court of Appeal of Florida, Sixth District.

Albert ARMSTRONG, Petitioner,

v.

STATE of Florida and Grady Judd, Sheriff of Polk County, Respondents.

Case No. 6D2024-1093

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August 26, 2024

### Synopsis

**Background:** Pretrial detainee filed petition for writ of habeas corpus, arguing that recent amendment to pretrial-detention statute was unconstitutional and that the Circuit Court, 10th Judicial Circuit, Polk County, failed to follow the statute and make the required findings when it granted the state's motion for pretrial detention and denied detainee's motion for pretrial release.

**Holdings:** The District Court of Appeal held that:

statute did not violate state constitutional provision setting forth the right of an accused to be released on bail, but

trial court failed to make findings of fact supporting its orders on the two motions and, thus, did not comply with the statute.

Petition granted with instructions; orders on motions for pretrial detention and pretrial release quashed.

Mize, J., filed an opinion concurring specially.

**Procedural Posture(s):** Appellate Review; Bail or Custody Motion.

\***1128** Petition for Writ of Habeas Corpus to the Circuit Court for Polk County. Lower Tribunal No. 2024-CF-003288

### Attorneys and Law Firms

J. Jervis Wise and Bjorn E. Brunvand, of Brunvand Wise, P.A., Clearwater, for Petitioner.

Ashley Moody, Attorney General, Tallahassee, and Helene S. Parnes, Senior Assistant Attorney General, Tampa, for Respondent, State of Florida.

No Appearance for Respondent, Grady Judd, Sheriff of Polk County.

### Opinion

PER CURIAM.

Having previously granted the petition for writ of habeas corpus, we write now to explain that decision. Detained while he awaits trial on the charge of aggravated child abuse, Petitioner, Albert Armstrong (“Defendant”), petitioned this Court for a writ of habeas corpus, arguing both that the recent amendment to the statutory scheme for pretrial detention is unconstitutional and that the trial court failed to follow the statute and make the required \***1129** findings. Defendant challenged the recent statutory amendment on two constitutional grounds: first, that the statute as amended violates article V, section 2 of the

Florida Constitution and second, that it vitiates the presumption in article I, section 14 of the Florida Constitution. As to Defendant's constitutional arguments, we determine that the first is unpreserved and the second is meritless. Nevertheless, we grant Defendant relief based upon the last argument he raised—that the trial court erred in failing to make statutorily required findings of fact in ordering his pretrial detention.

Article I, section 14 of the Florida Constitution sets forth the right of the accused to be released on bail. It reads as follows:

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

Art. I, § 14, Fla. Const. Several amendments to the primary statute governing pretrial release and detention in Florida took effect shortly before Defendant's arrest. Among the changes was the addition of a new subsection to section 907.041, now located at section 907.041(5)(d), Florida Statutes.<sup>1</sup> Section 907.041(5)(d) states:

If a defendant is arrested for a dangerous crime that is a capital felony, a life felony, or a felony of the first degree, and the court determines there is probable cause to believe the defendant committed the offense, the state attorney, or the court on its own motion, shall motion for pretrial detention. If the court finds a substantial probability that the defendant committed the offense and, based on the defendant's past and present patterns of behavior, consideration of the criteria in s. 903.046, and any other relevant facts, that no conditions of release or bail will reasonably protect the community from risk of physical harm, ensure the presence of the defendant at trial, or assure the integrity of the judicial process, the court must order pretrial detention.

After Defendant's arrest, the State filed a motion for pretrial detention pursuant to newly enacted section 907.041(5)(d), which the trial court granted after an evidentiary hearing. Both at the hearing and in his petition, Defendant argues that section 907.041(5)(d) violates article I, section 14 of the Florida Constitution in two ways.

Defendant first argues in his petition that section 907.041(5)(d) violates article I, section 14 of the Florida Constitution by stating that under certain circumstances “the state attorney, or the court on its own motion, shall motion for pretrial detention.” Defendant believes this new requirement offends article I, section 14 by vitiating a presumption in favor of release for persons charged with first degree felonies not punishable by life. We reject this **\*1130** argument because, among other reasons, while requiring a motion to be filed mandates that a hearing will be held, it does not affect the presumption that applies at the hearing.

Second, Defendant argues that section 907.041(5)(d) impermissibly lowers the burden the State must carry to establish that a defendant should be subject to pretrial detention by requiring the State to prove only a “substantial probability” of the statutory requirements, wherein article I, section 14 requires that “the proof of guilt is evident or the presumption is great.” We reject this argument as well because it misreads article I, section 14.

The heightened standard of proof applies only to the first category of persons in article I, section 14—persons charged with a capital offense or an offense punishable by life imprisonment. As explained by the Florida Supreme Court in *State v. Paul*, 783 So. 2d 1042 (Fla. 2001), the Florida Constitution provides:

two broad categories in which a person charged with a crime could be denied the right to be released on bond: (1) where the person is accused of a capital crime or an offense punishable by life imprisonment where the proof of guilt is evident and the presumption great; or (2) where no condition of release can reasonably protect the community, assure the presence of the accused or assure the integrity of the judicial process.

*Id.* at 1045.

As made plain by the text of article I, section 14 and as explained in *Paul*, only the first category in article I, section 14, specifies a level of proof, i.e., proof of guilt is evident and the presumption great. A level of proof is not specified for the second category in article I, section 14, and we reject Defendant's invitation to read a heightened standard of proof into the second category. *See Israel v. Desantis*, 269 So. 3d 491, 495 (Fla. 2019) (“Where the language of the Constitution is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written, as the constitutional language must be allowed to speak for itself.” (quoting *Fla. Soc’y of Ophthalmology v. Fla. Optometric Ass’n*, 489 So. 2d 1118, 1119 (Fla. 1986) (internal quotations omitted))).

Instead, the level of proof required for the second category was set by the Legislature as “substantial probability” long before this current controversy, and “substantial probability” was the level of proof in place when the Florida Supreme Court stated that a prior version of section 907.041, “fully[ ] comport[ed] with the Florida Constitution.” *Paul*, 783 So. 2d at 1052. Accordingly, we also reject Defendant's argument that section 907.041(5)(d) violates article I, section 14 by allowing a basis for pretrial detention to be established by a level of proof lower than “the proof of guilt is evident or the presumption is great.”<sup>2</sup>

Nevertheless, we find that the trial court failed to follow the statute, which at all relevant times has required that a trial court's order on a motion for pretrial detention contain both “findings of fact and conclusions of law to support it.” § 907.041(5), Fla. Stat. The judge who heard and granted the motion for pretrial detention did not make any findings of fact and a second judge who heard and denied Defendant's related motion for pretrial release merely referred to his predecessor's ruling without making any findings based \*1131 upon the evidence presented to him at the subsequent hearing over which he presided. *See Helveston v. State*, 193 So. 3d 1004, 1005 (Fla. 2d DCA 2016); *L.S. v. State*, 593 So. 2d 296, 297 (Fla. 5th DCA 1992).

Because the trial court did not comply with section 907.041 in granting the State's motion for pretrial detention, we grant Defendant's petition, quash the trial court's orders on the motion for pretrial detention and the motion for pretrial release, and order the trial court to conduct a new hearing on the motion for pretrial detention.

PETITION GRANTED.

NARDELLA and WOZNIAK, JJ., concur.

MIZE, J., concurs and concurs specially, with opinion.

MIZE, J., concurring specially.

I fully concur in the court's opinion, but I would add a bit more detail to the analysis.

### **Background and Procedural History**

Prior to January 1, 2024, Section 907.041(5), Florida Statutes, left the decision of whether to seek pretrial detention of a criminal defendant to the State Attorney handling the case, and left the decision of whether to order pretrial detention, even when a basis for pretrial detention was established, to the trial court presiding over the case.<sup>3</sup> Nothing in the statute required the State Attorney to seek pretrial detention, and Section 907.041(5)(c) provided that a trial court “may” order pretrial detention if it found a substantial probability that any one of certain criteria set forth in the statute was met. § 907.041(5)(c), Fla. Stat. (2023). The Florida Rules of Criminal Procedure likewise provide the State Attorney handling a criminal case with discretion regarding whether to seek pretrial detention. Rule 3.132(a) states that “[t]he state may file with the judicial officer at first appearance a motion seeking pretrial detention ...” Rule 3.132(b) states that “[a] motion for pretrial detention may be filed at any time prior to trial.”

On May 1, 2023, the Governor signed a bill into law that made a number of changes to the statutes governing pretrial detention and release. Ch. 2023-27, Laws of Fla. The law took effect on January 1, 2024. Among the changes was the addition of a new subsection to Section 907.041, now located at Section 907.041(5)(d).<sup>4</sup> Section 907.041(5)(d) states:

If a defendant is arrested for a dangerous crime that is a capital felony, a life felony, or a felony of the first degree, and the court determines there is probable cause to believe the defendant committed the offense, the state attorney, or the court on its own motion, shall motion for pretrial detention. If the court finds a substantial probability that the defendant committed the offense and, based on the defendant's past and present patterns of behavior, consideration of the criteria in s. 903.046, and any other relevant **\*1132** facts, that no conditions of release or bail will reasonably protect the community from risk of physical harm, ensure the presence of the defendant at trial, or assure the integrity of the judicial process, the court must order pretrial detention.

The primary changes resulting from the addition of this provision to Section 907.041 are: (1) if a defendant is arrested for a dangerous crime<sup>5</sup> that is a capital felony, a life felony, or a felony of the first degree, and the trial court determines that there is probable cause to believe that the defendant committed the offense, the State Attorney, or the trial court on its own motion, is now **required** to motion for pretrial detention of the defendant; and (2) when either the State Attorney or the court motions for pretrial detention under Section 907.041(5)(d), and the court finds a substantial probability that the defendant committed the offense and that no conditions of release or bail will reasonably protect the community from risk of physical harm, ensure the presence of the defendant at trial, or assure the integrity of the judicial process, the court **must** grant the motion for pretrial detention.

On April 11, 2024, Polk County Sheriff's deputies arrested Defendant for the charge of Aggravated Child Abuse. The charge stemmed from injuries Defendant allegedly inflicted upon his stepson (“Stepson”). On April 13, 2024, the State filed a motion for pretrial detention pursuant to Section 907.041(5)(d).<sup>6</sup> At the hearing on the motion, after hearing the evidence presented by the parties, the trial court granted the motion. In his oral ruling, the trial judge stated that “I have no qualms concluding that the State has met its burden.” However, he made no specific findings of fact. The judge did not make a specific finding that there was a substantial probability that Defendant committed the offense, or that no conditions of release or bail would reasonably protect the community from risk of physical harm, ensure the presence of Defendant at trial, or assure the integrity of the judicial process.

The judge that heard and decided the State's motion for pretrial detention was not the division judge assigned to the case. After the first judge's ruling granting the motion for pretrial detention, Defendant filed a motion for pretrial release, which was heard by the division judge. At the hearing on the motion for pretrial release, Defendant presented evidence which Defendant argued established that there was not a likelihood that Defendant committed the charged offense. Other than cross-examining a witness presented by Defendant, the State presented no evidence at the hearing. Neither party presented any evidence concerning

whether conditions of release or bail would reasonably protect the community from risk of physical harm, ensure the presence of Defendant at trial, or assure the integrity of the judicial process.

At the conclusion of the hearing on the motion for pretrial release, the trial judge denied the motion. In doing so, the trial judge stated that the ruling made by the prior judge on the motion for pretrial detention was “justified factually and legally.” The trial judge also stated that there was a “reasonable probability or substantial probability the offense has been committed” and that “there are no reasonable conditions that would protect the community from potential risk of harm.” However, it is clear from the transcript that the \*1133 trial judge was referring to the prior judge's ruling on the motion for pretrial detention and concluding that there was sufficient evidence presented at the first hearing to justify the prior judge's ruling (as opposed to making a new, separate ruling based on evidence presented at the hearing on the motion for pretrial release), as again the State presented no evidence at the second hearing concerning whether Defendant committed the charged offense, and neither party presented any evidence concerning whether conditions of release or bail would reasonably protect the community from risk of physical harm.

Defendant now brings a petition for writ of habeas corpus in this Court and requests that we quash the lower court's orders granting the State's motion for pretrial detention and denying Defendant's motion for pretrial release, and that we direct the trial court to set reasonable conditions of release for Defendant pending his trial.

### Analysis

#### **I. Article V, Section 2 of the Florida Constitution**

As noted in the court's opinion, Defendant asserts that Section 907.041(5)(d) violates Article V, Section 2 of the Florida Constitution, which states in pertinent part: “The supreme court shall adopt rules for the practice and procedure in all courts ...” However, that argument is not preserved for our review because Defendant did not raise it in the trial court below. At neither hearing held below nor in any of Defendant's written filings in the trial court did Defendant argue that Section 907.041(5)(d) violates Article V, Section 2. The requirement that a litigant preserve legal arguments for review by an appellate court by asserting those arguments in the trial court applies in pretrial habeas corpus proceedings. *Knight v. State*, 213 So. 3d 1019, 1022 (Fla. 1st DCA 2017). “This requirement affords the trial court an opportunity to resolve the issues without this court's involvement, and—where this court is involved—it provides us with a record of the parties’ arguments and the trial court's disposition thereof.” *Id.* (quoting *T.L.W. v. Soud*, 645 So. 2d 1101, 1105 (Fla. 1st DCA 1994) (internal quotations omitted)). In reviewing a trial court's order, we must not consider an argument that was never made to and never considered by the trial court. Because Defendant did not argue to the trial court that Section 907.041(5)(d) violates Article V, Section 2 of the Florida Constitution, that argument is not preserved for our review and the court appropriately does not consider it.

#### **II. Article I, Section 14 of the Florida Constitution**

Defendant did preserve his argument that Section 907.041(5)(d) violates Article I, Section 14 of the Florida Constitution. However, it does not.<sup>7</sup>

Article I, Section 14 provides:

**\*1134** Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of

release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

The second sentence of Article I, Section 14 was added to the Constitution by an amendment effective January 1, 1983, following the passage of a ballot initiative in the election of November 1982. *State v. Paul*, 783 So. 2d 1042, 1045 (Fla. 2001). Following the ratification of the amendment, the Legislature enacted Section 907.041, which “implement[s] the trial court's discretion to impose pretrial detention within the limits of Article 1, Section 14.” *Parker v. State*, 843 So. 2d 871, 877 (Fla. 2003) (quoting *Parker v. State*, 780 So. 2d 210, 212 (Fla. 4th DCA 2001) (quoting *Barns v. State*, 768 So. 2d 529, 532-33 (Fla. 4th DCA 2000))). The Florida Supreme Court has described Section 907.041 as containing “detailed and specific criteria for determining when a person may be detained prior to trial” and as constituting a “comprehensive and specific framework setting forth the multiple circumstances under which trial courts may act to deny bail and order pretrial detention.” *Paul*, 783 So. 2d at 1052. The Florida Supreme Court further stated that Section 907.041 “fully comports with the Florida Constitution and has long been the standard by which trial courts have been guided in determining whether to deny bail.” *Id.* at 1052; *see also Alcazar v. State*, 349 So. 3d 930, 934 (Fla. 3d DCA 2022) (“The Florida Legislature has provided comprehensive guidelines for when an original application for bail may be denied as codified in section 907.041, Florida Statutes.” (quoting *State v. Blair*, 39 So. 3d 1190, 1192 (Fla. 2010) (internal quotations omitted))).

Turning to the addition of Section 907.041(5)(d) to the statute, Defendant makes two arguments in support of his assertion that this new provision violates Article I, Section 14. First, Defendant argues that Section 907.041(5)(d) vitiates the constitutional presumption in favor of pretrial release for a person charged with a first-degree felony that is not punishable by life imprisonment. Defendant asserts that instead, Section 907.041(5)(d) creates a presumption in favor of pretrial detention for such persons by requiring the State Attorney or the trial court to motion for pretrial detention. However, Article I, Section 14 does not mandate any presumption for or against the filing of a motion for pretrial detention, and the mere filing of a motion does not create a presumption that the person will be detained.

Article I, Section 14 provides that a person charged with a crime not punishable by death or life imprisonment must be granted pretrial release on reasonable conditions unless “no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process.” Section 907.041(5)(d), on its face, does not require or allow a person to be detained unless this exact requirement is affirmatively established by the State<sup>8</sup> and found by the court to be satisfied. The **\*1135** statute tracks the requirement of Article I, Section 14 precisely and requires a court to grant a motion for pretrial detention only when the court finds that this requirement has been established by a substantial probability.

As to a person charged with a crime not punishable by death or life imprisonment, the only presumption mandated by Article I, Section 14 is that the person will be granted pretrial release on reasonable conditions unless “no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process.” Section 907.041(5)(d) complies with this presumption to the letter.

Defendant next argues that Section 907.041(5)(d) allowing the basis for pretrial detention to be established by only a “substantial probability” impermissibly lowers the burden the State must carry to establish that a defendant should be subject to pretrial detention. Specifically, Defendant asserts that Article I, Section 14 permits a person charged with a crime to be detained prior to trial only when “the proof of guilt is evident or the presumption is great,” a standard that is “even higher than the beyond a reasonable doubt standard required to obtain a conviction at trial.” *Thourman v. Junior*, 338 So. 3d 207, 212 (Fla. 2022). While Defendant acknowledges that this heightened standard of proof is contained only in the first prong of Article I, Section 14 pertaining to persons charged with a capital offense or an offense punishable by life imprisonment, he asserts that “it makes no sense that the State should be permitted any easier means of securing his detention for a first-degree felony than it would for a capital, life or punishable by life felony.”

We interpret Article I, Section 14 according to its text, not according to what Defendant thinks “makes sense.” *See Israel v. Desantis*, 269 So. 3d 491, 495 (Fla. 2019) (“Where the language of the Constitution is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written, as the constitutional language must be allowed to speak for itself.” (quoting *Fla. Society of Ophthalmology v. Fla. Optometric Ass’n*, 489 So. 2d 1118, 1119 (Fla. 1986) (internal quotations omitted))). By its plain language, Article I, Section 14 creates two separate and independent exceptions to the right of an accused to pretrial release. *See Alcazar*, 349 So. 3d at 934 (discussing the two distinct exceptions); *Thourtman v. Junior*, 275 So. 3d 726, 731 (Fla. 3d DCA 2019), *approved*, 338 So. 3d 207 (Fla. 2022) (same).

The first exception is contained in the first sentence and applies only “when a person is charged with a crime punishable by capital punishment or life imprisonment, and the State can demonstrate ‘the proof of guilt is evident or the presumption is great.’” *Alcazar*, 349 So. 3d at 934 (quoting *Thourtman*, 275 So. 3d at 731). The second exception applies any time a defendant is charged with a crime and “no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process.” Art. I, § 14, Fla. Const. This exception contains no limitation on the crimes to which it applies – and it therefore applies to any crime with which a defendant may be charged, not just crimes punishable by death or life imprisonment. *See id.*

Article I, Section 14 does not specify the level of proof by which its second exception must be established. However, prior to the addition of subsection (5)(d) to Section 907.041, the statute already permitted a defendant to be detained prior to trial if \*1136 a court found by a substantial probability that a basis for pretrial detention existed. § 907.041(5)(c), Fla. Stat. (2023).<sup>9</sup> This is the standard of proof that was in place to decide a motion for pretrial detention when the Florida Supreme Court conducted a detailed analysis of Section 907.041 and stated it “fully comports with the Florida Constitution and has long been the standard by which trial courts have been guided in determining whether to deny bail.” *Paul*, 783 So. 2d at 1052. Additionally, applying the second exception in Article I, Section 14, the Florida Supreme Court has specifically held that a defendant’s pretrial release can be revoked, and thereby denied from that point on, upon a trial court finding “probable cause” that the defendant committed a new crime while on pretrial release.<sup>10</sup> *Parker*, 843 So. 2d at 878-79. Probable cause is a lower standard of proof than “substantial probability.” *Id.* at 879. If probable cause is a sufficient standard of proof for denying a defendant pretrial release under Article I, Section 14, then the higher standard of “substantial probability” likewise must be sufficient.

For these reasons, I reject Defendant’s argument that Section 907.041(5)(d) violates Article I, Section 14 by allowing a basis for pretrial detention to be established by a “substantial probability.”

### III. The trial court’s compliance with Section 907.041

The amendment to Section 907.041 did not change the requirements for a trial court’s order granting a motion for pretrial detention. As it did before the amendment, the statute provides:

The pretrial detention order of the court shall be based solely upon evidence produced at the hearing and shall contain findings of fact and conclusions of law to support it. The order shall be made either in writing or orally on the record. The court shall render its findings within 24 hours of the pretrial detention hearing.

§ 907.041(5)(l), Fla. Stat. (2024)<sup>11</sup>; § 907.041(5)(i), Fla. Stat. (2023)<sup>12</sup>. Florida Rule of Criminal Procedure 3.132(c)(2) contains the same requirements. *See also Lax v. Marceno*, — So.3d —, —, 2023 WL 2619523, at \*1 (Fla. 6th DCA Mar. 24, 2023).

Defendant is correct that the trial court did not comply with these requirements in granting the State's motion for pretrial detention. A trial court's order on a motion for pretrial detention must contain both "findings of fact and conclusions of law to support it." \*1137 § 907.041(5)(l), Fla. Stat. (2024)<sup>13</sup>. The judge that heard and granted the motion for pretrial detention did not make any findings of fact. While the generalized statement that, "I have no qualms concluding that the State has met its burden" may constitute a conclusion of law, it is not a finding of fact that there is a substantial probability that Defendant committed the charged offense. It is certainly not a finding of fact that no conditions of release or bail will reasonably protect the community from risk of physical harm, ensure the presence of Defendant at trial, or assure the integrity of the judicial process.

The trial judge that denied the motion for pretrial release stated that there was a "reasonable probability or substantial probability the offense has been committed" and that "there are no reasonable conditions that would protect the community from potential risk of harm." However, as noted above, the transcript makes clear that the judge was referring to the prior judge's ruling on the motion for pretrial detention and concluding that there was sufficient evidence presented at the first hearing to justify the prior judge's ruling. The second judge was not making findings based on the evidence presented at the hearing on the motion for pretrial release over which he presided. In this context, the second judge could not make factual findings based on evidence presented at a hearing over which he did not preside and at which he was not present. *See Helveston v. State*, 193 So. 3d 1004, 1005 (Fla. 2d DCA 2016); *L.S. v. State*, 593 So. 2d 296, 297 (Fla. 5th DCA 1992).

It does not appear that the second judge was purporting to make findings based on evidence presented at the hearing on the motion for pretrial release over which he presided. But if he was, there would have been no competent, substantial evidence to support those findings because the State presented no evidence at the second hearing concerning whether Defendant committed the charged offense, and neither party presented any evidence at that hearing concerning whether conditions of release or bail would reasonably protect the community from risk of physical harm. *See* § 907.041(5)(h), Fla. Stat. (2024) ("The state attorney has the burden of showing the need for pretrial detention."); *Alcazar*, 349 So. 3d at 932 ("We review the trial court's factual determinations under an abuse of discretion standard and look to determine whether competent substantial evidence exists in the record to support the trial court's findings of fact.").

In sum, no hearing occurred in this case in which a judge heard evidence on the issues material to the motion for pretrial detention and then made a ruling based on that evidence that complied with Section 907.041(5)(l).<sup>14</sup> Defendant is correct that the trial court did not comply with the statute.

### Conclusion

The court properly did not consider Defendant's argument that Section 907.041(5)(d) violates Article 5, Section 2 of the Florida Constitution because Defendant did not make that argument to the trial court below and it is not preserved for our review. Having considered Defendant's remaining arguments, I agree with the court's conclusion that Section 907.041(5)(d) does not violate Article I, Section 14 of the Florida Constitution. However, Defendant is correct that the trial court did not comply with Section 907.041 in granting the State's motion for pretrial detention. Accordingly, I concur in the court's decision to grant Defendant's \*1138 petition, quash the trial court's orders on the motion for pretrial detention and the motion for pretrial release, and order the trial court to conduct a new hearing on the motion for pretrial detention.

### All Citations

395 So.3d 1127, 49 Fla. L. Weekly D1789

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**Footnotes**

- 1 This new subsection was added as subsection (4)(d) of Section 907.041 pursuant to a bill signed into law by the Governor on May 1, 2023. Ch. 2023-27, § 4, Laws of Fla. However, another bill signed into law by the Governor on June 12, 2023, but which took effect on October 1, 2023, renumbered subsection (4) as subsection (5). Ch. 2023-225, § 1, Laws of Fla. The statute was later amended again pursuant to a bill signed into law by the Governor on May 6, 2024. Ch. 2024-157, § 1, Laws of Fla. That amendment was not in effect during the proceeding below.
- 2 In so holding, we recognize Florida Rule of Criminal Procedure 3.132 also sets forth a level of proof lower than “the proof of guilt is evident or the presumption is great” and note that Defendant makes no mention of the rule in his argument.
- 3 Prior to October 1, 2023, subsection (5) of Section 907.041 was numbered as subsection (4). *See* note 4, *infra*.
- 4 The bill cited above added this new subsection as subsection (4)(d) of Section 907.041. Ch. 2023-27, § 4, Laws of Fla. However, another bill signed into law by the Governor on June 12, 2023, but which took effect on October 1, 2023, renumbered subsection (4) as subsection (5). Ch. 2023-225, § 1, Laws of Fla. *See* note 3, *supra*. The statute was later amended again pursuant to a bill signed into law by the Governor on May 6, 2024. Ch. 2024-157, § 1, Laws of Fla. That amendment was not in effect during the proceeding below and would not impact this opinion if it had been.
- 5 Section 907.041(5)(a) sets forth a list of the crimes that qualify as a “dangerous crime.”
- 6 The motion for pretrial detention specifically stated that it was filed pursuant to Section 907.041(5)(d), Florida Statutes.
- 7 While Defendant asserts in his Petition that Section 907.041(5)(d) violates Article I, Section 14 “on its face and as applied to this case,” nothing in his actual argument made below or in his Petition concerns the statute's specific application to Defendant's case, as opposed to how the statute applies to all criminal defendants. Defendant's arguments, which are each discussed herein, concern only purported facial constitutional infirmities in the statute. Therefore, I treat Defendant's challenge to the constitutionality of Section 907.041(5)(d) under Article I, Section 14 as a facial challenge and consider only the text of the statute, not the statute's specific application to a particular set of circumstances. *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014). To succeed on a facial challenge to the constitutionality of a statute, Defendant “must demonstrate that no set of circumstances exists in which the statute can be constitutionally applied.” *Id.*
- 8 Section 907.041(5)(h) provides that “[t]he state attorney has the burden of showing the need for pretrial detention.”
- 9 Prior to October 1, 2023, this subsection was numbered as Section 907.041(4)(c). *See* note 4, *supra*.
- 10 The Florida Supreme Court found that Section 903.0471, which allows a trial court, on its own motion, to “revoke pretrial release and order pretrial detention if the court finds probable cause to believe that the defendant committed a new crime while on pretrial release,” properly implements the third criterion of the second exception in Article I, Section 14, which is that a defendant may be denied pretrial release if necessary to “assure the integrity of the judicial process.” *Parker*, 843 So. 2d at 878. The Court reasoned that “the commission of a crime by a pretrial releasee unquestionably impugns the integrity of the judicial process.” *Id.*
- 11 From January 1, 2024 to May 5, 2024, which is the time period during which the hearing on the motion for pretrial detention was conducted below, this provision was numbered as Section 907.041(5)(k). Effective May 6, 2024, this provision is now numbered as Section 907.041(5)(l). The text of the provision remains the same.

12 Prior to October 1, 2023, this provision was numbered as Section 907.041(4)(i). *See* note 4, *supra*. From October 1, 2023 to December 31, 2023, this provision was numbered as Section 907.041(5)(i).

13 *See* note 11, *supra*.

14 *See* note 11, *supra*.

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