

IN THE COUNTY COURT OF THE SEVENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR VOLUSIA COUNTY
CRIMINAL DIVISION

THE STATE OF FLORIDA,

vs.

Case No.: 2021-303222-CFDB

NICOLE MARIE JACKSON-MALDONADO
Defendant.

Division: "40"

MOTION FOR POSTCONVICTION RELIEF

COMES NOW, Defendant, NICOLE MARIE JACKSON-MALDONADO, by and through undersigned counsel, and hereby files this Motion for Postconviction Relief pursuant to Fla. R. Crim. P. 3.850, for this Court's Order to Set Aside the Judgment and Sentence in the above styled cause and, in support, states as follows:

RULE 3.850 PROCEDURAL HISTORY

1. On June 1, 2021, the fourteen (14) year old Defendant and (12) year old Co-Defendant were arrested by Volusia County Sheriff's Deputies following a shoot-out in and around a residence in Enterprise, Florida. None of the Deputies were injured while Defendant suffered multiple gunshot wounds and had to be airlifted from the scene.
2. On June 17, 2021, following the transfer of her case from Juvenile Court to Adult Court, Defendant was charged by Information as follows: Count I, Attempted First Degree Murder of a Law Enforcement Officer with a Firearm; Count II, Burglary of a Dwelling while Armed with a Firearm; and Count III, Criminal Mischief (\$1,000.00 or more). See (Exhibit 1 – Information).
3. On June 22, 2021, Larry Avallone of the Seventh Judicial Circuit Office of the Public Defender entered his Notice of Appearance on behalf of the Defendant. See (Exhibit 2 – Notice of Appearance).
4. On January 27, 2023, following an ex-parte Nelson Hearing, Defendant accepted a negotiated Plea with the Volusia County Office of the State Attorney.
5. As part of the plea, the State Amended the Information to reflect: Count I, Attempted First Degree Murder with a Firearm; Count II, Burglary of a Dwelling while Armed with a Firearm; Count III,

Criminal Mischief (\$1,000.00 or more). See (Exhibit 3 – Amended Information).

6. Defendant entered a Plea Nolo Contendere to Counts I, II, and III of the Amended Information. See (Exhibit 4 – Plea Agreement).
7. Judge Elizabeth A. Blackburn accepted the Plea, adjudicating Defendant guilty, and sentencing her in Count I, Attempted First Degree Murder with a Firearm, to twenty (20) years in the Florida Department of Corrections; in Count II, Burglary of a Dwelling while Armed with a Firearm, to thirty (30) years of probation to run consecutive to Count I; and in Count III, Criminal Mischief (\$1,000.00 or more), to five (5) years of probation to run consecutive to Counts I and II.
8. Defendant did not appeal the Judgment and Sentence.
9. To the undersigned counsel's knowledge, no other postconviction motions have been filed in this case and no other collateral appeals are pending.
10. Defendant, NICOLE MARIE JACKSON-MALDONADO, now files this timely Rule 3.850 Motion for Postconviction Relief seeking this Court to Set Aside the Judgment and Sentence in the above stated matter based on ineffective assistance of trial counsel.
11. Undersigned counsel certifies that Defendant can read, write, and understand English.
12. Pursuant to Fla. R. Crim. P. 3.850, a statement of facts in this matter is as follows:

STATEMENT OF FACTS

1. On June 1, 2021, the 14-year-old Defendant ran away from the Florida United Methodist Children's Home (FUMCH) in Enterprise, FL with a 12-year-old male Co-Defendant. The Defendant and Co-Defendant burglarized an unoccupied residence that contained firearms. The Volusia County Sheriff's arrived at the residence where shots were fired upon the Deputies. The Deputies returned fire, and Defendant was shot several times. None of the Deputies sustained any injuries. See (Exhibit 5 – Charging Affidavit).
2. On June 17, 2021, the Office of the State Attorney, for the Seventh Judicial Circuit, filed an Information charging the Defendant with Count I, Attempted First Degree Murder of a Law Enforcement Officer (Firearm), Count II, Burglary of a Dwelling While Armed with a Firearm, and Count III, Criminal Mischief (\$1000.00 or More).

3. On June 21, 2021, Larry Avallone, Esq. of the Office of the Public Defender, for the Seventh Judicial Circuit, entered his Notice of Appearance on behalf of the Defendant.
4. On January 5, 2023, at a Case Management Conference, Defendant requested a Nelson Hearing and made an oral Motion to Remove Counsel. This Motion was denied by the Court. Trial was then set for February 21, 2023, with a deadline of January 27, 2023, for all pre-trial Motions, and a Motion hearing date of February 6, 2023. See (Exhibit 6 – Court Action Form).
5. On the same date, in open court, Defendant filed a Motion entitled “What to Say” where she requested a Trial be set, asked that she be able to dismiss her public defenders, and listed specific complaints as to the representation she was receiving. See (Exhibit 7 – Letter filed in Open Court).
6. On January 20, 2023, Defendant filed a twenty-three (23) page sworn pro se Motion entitled “Motion for Reconsideration to Dismiss Defense Counsel and Request Full Nelson Hearing”. See (Exhibit 8 – Motion for Nelson Hearing).
7. On January 23, 2023, the Court set the Motion for an evidentiary hearing on January 27, 2023. See (Exhibit 9 - Notice of Hearing).
8. On January 24, 2023, prior to the hearing, the Court filed a Sua Sponte Order Determining Confidentiality of Court Records in Accordance with Rule of Judicial Administration 2.420(c)(9) finding documents attached to “Defendant’s Motion for Reconsideration to Dismiss Defense Counsel and Request Full Nelson Hearing” confidential, specifically identifying Exhibit “A” as “Medical Records” and Exhibits “D and “E” as “attorney-client privilege”. See (Exhibit 10 – Sua Sponte Determination).
9. On January 27, 2023, the evidentiary hearing on the pro se “Motion for Reconsideration to Dismiss Defense Counsel and Request Full Nelson Hearing” proceeded. At the beginning of the hearing, the Court closed the hearing to the public making the finding “that the instant proceeding has garnered “extraordinary media interest” and world-wide attention. The Court finds that closure of the Nelson hearing proceeding and the record pertaining thereto, is necessary to protect the due process rights of the Defendant to a fair trial”. At some point, representatives of the State Attorney’s Office for the Seventh Judicial Circuit left the proceeding converting it to be an ex-parte evidentiary hearing. See

(Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing).

10. Following the ex-parte hearing, Defendant accepted the State's offer to a reduced charge in Count I, Attempted First Degree Murder (Firearm), and a plea as charged in Count II, Burglary of a Dwelling While Armed with a Firearm, and Count III, Criminal Mischief (\$1000.00 or More). The Defendant was adjudicated guilty and sentenced to twenty (20) years of Imprisonment in the Florida Department of Corrections to be followed by a total of forty-five (45) years of probation.
11. It should be noted that this plea had been available to Defendant since at least June 1, 2022, however she only agreed to accept it after the ex-parte Nelson Hearing.
12. On the same day, the Court entered an Order to Seal Records finding "Closure of the record, related to the Nelson hearing, together with closure of the proceedings on the Nelson hearing only, would be effective in protecting the rights of the Defendant without being overly broad". The Court then ordered that the "Clerk is hereby directed that the Ex-Parte Nelson hearing proceeding, including, but not limited to, the transcript and record of said proceeding, is to be kept under seal and shall not be opened unless authorized by court order."
13. On June 18, 2024, undersigned counsel, entered his Notice of Limited Appearance.
14. Following the filing of a Motion to Obtain Confidential Court Records, the Court entered an Order on July 26, 2024, granting Counsel access to the confidential records.

MEMORANDUM OF LAW ON INEFFECTIVE ASSISTANCE OF COUNSEL

The appropriate method to seek postconviction relief due to ineffective assistance of counsel is that such matter, generally, should be raised in a Fla. R. Crim. P. 3.850 Motion for Postconviction Relief. *Kelley v. State*, 486 So.2d 578, 585 (Fla. 1986). When ineffective assistance is alleged, the burden is on the person seeking collateral relief to allege the grounds for relief specifically, and to establish whether the grounds resulted in prejudice. Pursuant to Fla. R. Crim. P. 3.850, a Motion for Post-Conviction Relief alleging ineffective assistance of counsel must be filed within two years of the judgment and sentence becoming final. The Courts have found that absent an appeal, a Defendant's judgment and sentence becomes final after thirty days has elapsed from the date the judgement and sentence was entered. See *Mingo v. State*, 790

So. 2d 1164 (Fla. 2d DCA 2001) (stating that a judgment and sentence becomes final for purposes of the two-year period for filing a rule 3.850 motion for postconviction relief when the thirty-day period for filing an appeal expires).

In *Strickland v. Washington*, the U.S. Supreme Court provided the following standard for determining ineffective assistance of counsel after a defendant has been found guilty at trial:

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction... has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense... [T]he proper standard for attorney performance is of reasonably effective assistance. *Strickland v. Washington*, 466 U.S. 668, 686-687 (1984).

In *Alcorn v. State*, 121 So. 3d 419, 425 (Fla. 2013) the Court explained that claims of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) as follows: To prove a claim under *Strickland*, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Id.* at 687, 104 S.Ct. 2052. The deficiency prong requires the defendant to establish conduct on the part of counsel that is outside the broad range of reasonableness under prevailing professional standards. *Id.* at 688, 104 S.Ct. 2052. The *Strickland* prejudice prong requires the defendant to establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. "That standard does not 'require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in {that} outcome.'" *Parker v. State*, 89 So.3d 844, 855 (Fla.2011) (quoting *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 455-56, 175 L.Ed.2d 398 (2009)). *Alcorn*, 121 So. 3d at 425.

"[W]hen a defendant presents competent substantial evidence in support of his ineffective assistance claim[s], the burden shifts to the State to present contradictory evidence." *Williams*, 974 So.2d at 407 (citing *Green v. State*, 857 So.2d 304, 305 (Fla. 2d DCA 2003)); accord *Thomas v. State*, 117 So.3d 1191, 1194 (Fla. 2d DCA 2013) ("Generally, a defendant has the burden to present evidence at a post-conviction

evidentiary hearing, and once he does so, even if only through the presentation of his own testimony, the State must present contradictory evidence.”). While trial counsel's strategic decisions are “virtually unchallengeable,” those decisions which are “patently unreasonable” will not withstand scrutiny. *Light*, 796 So.2d at 616 (first quoting *Downs v. State*, 453 So.2d 1102, 1108 (Fla. 1984); and then quoting *Roesch v. State*, 627 So.2d 57, 58 n.3 (Fla. 2d DCA 1993)). Where there is “no conflicting testimony that required the [postconviction] court to assess the relative credibility of different witnesses,” the issue is not one of witness credibility. *Feldpausch v. State*, 826 So.2d 354, 356 (Fla. 2d DCA 2002); see also *Yarbrough v. State*, 871 So.2d 1026, 1029 (Fla. 1st DCA 2004) (“[T]he evidentiary hearing raised virtually no disputed issues.... Thus, the [postconviction] court needed only to apply these established facts to the law regarding ineffective assistance of counsel.”). “[I]f a defendant's testimony is unrefuted and the postconviction court has not articulated a reason to disbelieve the defendant, the court cannot choose to disregard the defendant's testimony.” *Thomas*, 117 So.3d at 1194.

“A rule 3.850 movant is entitled to an evidentiary hearing on an ineffective assistance of counsel claim if he specifies facts, not conclusively rebutted by the record, demonstrating counsel's deficiency in performance that prejudiced him.” *Jackson v. State*, 711 So.2d 1371, 1372 (Fla. 4th DCA 1998) See *Rose v. State*, 617 So.2d 291, 296 (Fla.), cert. denied, 510 U.S. 903 (1993). Specifically, a defendant is entitled to an evidentiary hearing on a post-conviction relief motion unless (1) the motion, files, and records in the case conclusively show that the defendant is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Absent an evidentiary hearing, factual allegations made by the defendant must be accepted as true to the extent that they are not refuted by the record. *Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000).

CLAIM ONE

DEFENDANT, NICOLE MARIE JACKSON-MALDONADO, WAS DENIED EFFECTIVE REPRESENTATION OF COUNSEL WHEN HER ATTORNEY FAILED TO ENSURE THAT SHE WAS COMPETENT AND ABLE TO KNOWINGLY AND INTELLIGENTLY ACCEPT A PLEA OFFER BASED ON HER LENGTHY MENTAL HEALTH HISTORY AND THE EFFECTS OF THE EX-PARTE NELSON HEARING

Defendant was denied effective representation of counsel when her attorneys failed to ensure that she

was able to make a knowing and intelligent decision to forgo her right to a trial and accept a negotiated disposition immediately following the January 27, 2023, ex-parte Nelson Hearing. At the time of this plea, Defendant was fifteen (15) years old and suffered from a lengthy, well documented mental health history. She was being held in isolation within the county jail leading to a deteriorated mental state as well as feelings of [REDACTED] and [REDACTED]. Defendant went as far as filing a pro se Petition for Writ of Habeas Corpus to remove herself from solitary confinement claiming she was only allowed out of her cell for showers. See (Exhibit 12 – Petition for Writ of Habeas Corpus). Prior to the Plea, Defendant went through an ex-parte Nelson Hearing where her attorney, as well as the Court, challenged her assertions and questioned her understanding of the case, as well as the people who had been advising her. At the end of this emotional hearing, Defendant stated that she wanted to accept the State's plea offer, requesting that she be immediately sentenced. After a short recess, Defendant entered her plea. It should be noted that this same plea offer had been available to Defendant since at least June of 2022, and she had always rejected this offer, preferring a trial. Defendant would assert that based on her mental health issues, the toll of being isolated in the jail, and the pressure she faced during the ex-parte hearing, she felt she had no option but to accept a deal to get out of the situation and out of the Jail. Defense counsel was aware of Defendant's mental health issues, difficulty understanding legal concepts, and inability to appropriately deal with emotionally challenging situations. Counsel had a duty to continue the case and meet with Defendant, along with a forensic psychologist, to ensure that Defendant was competent and understood what she was doing in entering a plea. While Defendant had previously been seen by two (2) forensic psychologists, ultimately being found competent, the most recent finding was made on October 12, 2021, almost seventeen (17) months before the plea. These findings also did not take into account the pressures of the ex-parte hearing, her lengthy isolation in the jail, and the stresses she was under with the Trial date approaching. There was no reason to rush immediately into a plea after the ex-parte hearing, as the Trial date was still a month out with intervening court dates already set. Defendant was prejudiced by her attorney's failure to ensure that she was competent and could knowingly and intelligently enter a plea following the hearing. Had she been taken from the Courtroom, given an opportunity to consider the information outside of the stress of the hearing, and met with a mental health professional, Defendant would not have entered a plea and would [REDACTED]

have proceeded to trial as she had previously requested. Defendant would assert that she was not competent at the time she entered her plea on January 27, 2023, as she was unable to understand the consequences of what she was doing based on her serious mental health issues, the emotional state she was in following the ex-parte hearing, and her desperation to get out of isolation at the county jail.

In *Saunders v. State*, 148 So. 3d 843 (Fla. 5th DCA 2014), the Court found that a Defendant raised a facially sufficient claim of ineffective assistance of counsel when he "asserted that his trial counsel was ineffective for permitting him to enter an involuntary plea due to his mental illness and use of medication." 148 So. 3d at 844. See also *Jackson v. State*, 29 So. 3d 1161, 1162 (Fla. 1st DCA 2010) (concluding defendant's claim was facially sufficient where the defendant "allege[d] that he was incompetent and did not understand the consequences of his plea, that he had a history of mental illness, had not taken his schizophrenia medication, was suffering from delusions and hearing voices at the time of the plea and that he informed counsel of his condition"). Similarly, in *Hird v. State*, 204 So. 3d 483, (Fla 5th DCA 2016), Defendant alleged that his trial attorney allowed him to enter a plea despite knowing that he was under the influence of antipsychotic medication. Defendant asserted that he informed defense counsel and provided medical documents that confirmed that the medications were negatively affecting him to the extent that he did not understand what was occurring. The Court found that Defendant's motion essentially claimed that counsel misadvised him to enter a plea while he was substantively incompetent and but for the ineffective assistance of counsel, he would have insisted on a trial instead of pleading nolo contendere.

Under Fla. R. Crim. P. 3.210 (a) Proceedings Barred during Incompetency. A person accused of an offense or a violation of probation or community control who is mentally incompetent to proceed at any material stage of a criminal proceeding shall not be proceeded against while incompetent. It is a well-established principle of law that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975); see also *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); *Scott v. State*, 420 So. 2d 595 (Fla. 1982); *Lane v. State*, 388 So. 2d 1022 (Fla. 1980); § 916.12, Fla. Stat. (1995). This principle of law, while rooted in the common law, ensures a defendant's due process

right to a fair trial. *Drope*, 420 U.S. at 171–72, 95 S.Ct. at 903– 04. Florida Rule of Criminal Procedure

3.211(a)(1) codifies what is known as the *Dusky* standard of competency, that is, “whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings.” The rule 3.211 standard applies to “any material stage of a criminal proceeding.” Fla. R. Crim. P. 3.210.

In *Nelson v. State*, 43 So. 3d 20, 33 (Fla. 2010) the Florida Supreme Court held that Florida courts “continue to recognize a “narrow” claim of ineffective assistance of counsel for failure to raise a defendant’s alleged incompetency”, see *Jackson v. State*, 29 So. 3d 1161, 1162 (Fla. 1st DCA 2010). “In order to demonstrate prejudice from counsel’s failure to investigate his competency, a petitioner has to show that there exists ‘at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial’ ”. *Id.* at 1487. (emphasis supplied) (quoting *Alexander v. Dugger*, 841 F. 2d 371, 375 (11th Cir. 1988)); see also *Johnston v. State*, 63 So.3d 730, 741 (Fla. 2011). To satisfy the deficiency prong based on counsel’s handling of a competency issue, the postconviction movant must allege specific facts showing that a reasonably competent attorney would have questioned competence to proceed. The standard for competency to proceed is set out in *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), and codified in Florida Rule of Criminal Procedure 3.211. The question is “whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings.” Fla. R. Crim. P. 3.211(a)(1). The focus of the prejudice inquiry is on actual prejudice, whether, because of counsel’s deficient performance, the defendant’s substantive due process right not to be tried while incompetent was violated. In order to establish prejudice in a properly raised ineffective assistance of counsel claim, the postconviction movant must, as with a substantive incompetency claim, set forth clear and convincing circumstances that create a real, substantial and legitimate doubt as to the movant’s competency. *Thompson v. State*, 88 So. 3d 312, 320 (Fla 4th DCA 2012).

DEFENDANT’S MENTAL HEALTH HISTORY PRIOR TO HER ARREST

Defendant has an extensive and well documented history of mental health issues, prescribed psychotropic medication, and childhood trauma. Defendant was born on February 8, 2007, in Puerto Rico.

The first available Department of Children and Family (DCF) report concerning Defendant comes from March 15, 2011, when an investigation was opened regarding her being underweight and malnourished. The first information concerning Defendant's mental health, comes from a May 2, 2016, DCF Report, when Defendant was nine (9), finding that "Nicole is a poor student because of the ghosts that won't leave her alone. [She] has been ~~backed~~ because she tried to strangle herself with a belt and stabbed herself repeatedly with a pencil. Nicole also sees ghost[s] and they affect her school performance." See (Exhibit 13 – DCF Confidential Investigative Summary, dated March 16, 2011, and May 2, 2016). This Report stated that she was taking ~~Alivif, 5 mg, Clovidine 0.1 mg, Depakote 150 mg, and Strattera 10 mg~~. On December 12, 2016, a DCF special conditions assessment summary (7 months later), indicated that Defendant has been diagnosed with ~~ADHD, ODD, and Bipolar Disorder~~ with an unnamed medication that was previously at a dose of ~~10 mg per day~~, but was then taking a dose of ~~7.5 mg twice a day~~. The assessment specifically found this "~~change [redacted] not sufficient~~". See (Exhibit 14 – DCF Special Conditions Assessment Summary, dated December 12, 2016).

The next available DCF report comes from September 9, 2018, where the Florida Abuse Hotline received a report that the children in Defendants mother's care were looking for food, missing school, not at the appropriate level for their ages, and unkept. There were twenty-one (21) prior events involving Defendant and her mother, with the first verified report dating back to 2011. It is reported in the DCF investigation summary that "~~she has bipolar disorder~~" and was ~~backed~~ at school on October 12, 2018, due to her grandfather not administering her ~~psychotropic~~ medications. The same report described Defendant as "very violent" without her medication and that all the children "struggle with mental health issues and are on medications." On December 9, 2018, a follow up DCF report states "the mother has approximately 20 prior incidents since September 2018 involving her and her children" which would be in a four (4) month timespan. See (Exhibit 15 – DCF Confidential Investigative Summary, dated September 19, 2018, to December 12, 2018). On April 30, 2019, Defendant and her siblings were removed from their mother's care and placed in the custody of the State of Florida. See (Exhibit 16 – Lorio Forensics, dated October 7, 2022). Following the removal, Defendant was in fourteen (14) different foster homes from April 30, 2019, to June 1, 2021, with a total of nineteen (19) different placements. In addition, Defendant had

five (5) [redacted] events in the five (5) months preceding the offense in the case. See (Exhibit 17 – Initial Suitability Assessment, dated May 20, 2021, Page 5).

A breakdown of Defendant's [redacted] psychotropic prescription medication history ascertained through mental health evaluations and medical records is as follows: Defendant was prescribed [redacted] at the age of five (5). See (Exhibit 18 – Valerie R. McClain Forensic Psychological Evaluation, dated July 13, 2022, and September 1, 2022). The following is a short list of Defendant's [redacted] medication history between the ages of twelve (12) and fourteen (14). On May 25, 2019, the Florida United Methodist Children's Home (FUMCH) discharge report indicated that Defendant was taking [redacted] and [redacted]. On June 17, 2019, it was reported that Defendant was taking [redacted] once a day at night and [redacted] of [redacted] was added twice a day. See (Exhibit 17 – Initial Suitability Assessment, dated May 20, 2021, Page 29 – Families First Comprehensive Behavioral Health Assessment July 31, 2019). On September 13, 2019, records indicate that Defendant was being treated by [redacted], D. Paul H., MD. It is unclear if the [redacted] and [redacted] were discontinued at this time, or just not reported that it was continued, due to the poor record keeping from the multiple placements. On October 29, 2019, Defendant was taking [redacted] 15 mg of [redacted] daily, 0.1 mg of Clonidine three times a day, 0.1 mg of [redacted] twice a day, and 1.0 mg of Intaliv per day. See (Exhibit 17 – Initial Suitability Assessment, dated May 20, 2021, Page 48 – [redacted] Forensic Psychologist [redacted]). On April 9, 2021, the medical report from Dr. Maria MacFarlane indicated that there was a dosage change in the [redacted] to 0.5 mg three times a day, a continuance of the [redacted] at 2 mg at night, and the addition of [redacted] [redacted] weekly. See (Exhibit 17 – Initial Suitability Assessment, dated May 20, 2021, Page 63 Florida Department of Children and Families). Records do not indicate if the [redacted] were discontinued at this time. On April 19, 2021, the Initial Suitability Assessment states that "no additional changes to medications were made as she had a recent change the visit before." See (Exhibit 17 – Initial Suitability Assessment, dated May 20, 2021, Page 2 - Magellan of Florida). On May 1, 2021, all [redacted] medications were discontinued, and Defendant was placed on [redacted] at night, however, the order to administer [redacted] entered on May 20, 2021, was at a [redacted]. See (Exhibit 19 – North Florida [redacted] Medical Services, Inc, dated June 15, 2021, and Exhibit 17 - Initial Suitability Assessment dated May 20, 2021, Page 59 - Order

Authorizing Administration of [redacted] Medication). The FDA has issued a boxed warning for children that are administered [redacted], including “increased risk of suicidal thoughts and behavior in children, adolescents and young adults taking [redacted]” and to “monitor for worsening and emergence of suicidal thoughts and behaviors.” “Boxed warnings are the highest level of safety-related warnings that a medication can have assigned by the FDA.” [redacted] also has a list of adverse reactions in children including, “somnolence, dizziness, fatigue, increased appetite, nausea, vomiting, dry mouth, tachycardia, [and] weight increased.” Defendant had all [redacted] medications stopped abruptly and according to the report and monitoring plan by Dr. Mariam Rahmani, [redacted] should not be “stopped abruptly and [to] taper off...” See (Exhibit 17 – Initial Suitability Assessment, dated May 20, 2021, Page 70, [redacted] Medication Treatment Plan Review from DCF). On May 18, 2021, an Order for Authorization for Administer [redacted] Medication was entered for the medications [redacted] 100 mg and [redacted] mg three times per day reflecting the prescriptions written on May 17, 2021, by Dr. [redacted] Macfarlane. However, all [redacted] medications were stopped on May 1, 2021, with the exception of [redacted]. On May 19, 2021, it was reported that Defendant was still taking [redacted] and [redacted] was started at [redacted] once a day. On May 20, 2021, the Initial Suitability Assessment reflected that Defendants medication list at that time was [redacted] three times per day and [redacted] 2 mg at night, which was a contradiction to the prescription that was written on May 17, 2021, by Dr. Maria Macfarlane. See (Exhibit 17 – Initial Suitability Assessment, dated May 20, 2021, Page 4 - Magellan of Florida). On May 30, 2021, Defendant was admitted to FUMCH, and the admission records indicated that Defendant did not have any medication on the property at the time. See (Exhibit 20 – FUMCH Daily Logs, dated May 30, 2021, Page 3). The medication history was further outlined on June 15, 2021, in Dr. Louis [redacted] report, that Defendant was taking [redacted], and at the end of May 2021, [redacted] of [redacted] was added, and the [redacted] was discontinued. At this time, the [redacted] dose did not change and was continued at [redacted] daily. See (Exhibit 19 – North Florida Psychological Services, Inc, dated June 15, 2021). [redacted] causes elevated blood sugar and should be monitored closely when on this drug. Dr. Maria Macfarlane noted in her records that Defendant should have her blood sugar monitored while taking this drug, however, the records that were available do not indicate that this recommended diagnostic

was actually performed. Different reports allude to different drug dosages and different prescription medications.

There are numerous documented side effects when ceasing medications without tapering off them. When is abruptly stopped, as was the case three (3) days prior to the offense, side effects can include restlessness, irritability, anxiety, dysphoria, sleep disturbance, insomnia, tachycardia, hypertension, and dizziness. In another peer reviewed journal article, it is reported that it took 23% of the participants at least one (1) year to successfully withdraw completely from and 18% of the participants reported psychosis after ceasing. Compounding the withdrawal side effects from the , the multiple foster home placements, the multiple Baker Act, and the "borderline intellectual functioning" as described in subsequent evaluations, were all factors that contributed to the stress preceding the offense. See (Exhibit 19 – North Florida Psychological Services, Inc, dated June 15, 2021). One report even stated under the summary of findings that "the child appears to have serious enough to require residential treatment and is reasonably likely to benefit from the treatment", however, in the conclusion of the same report it stated that "residential services for mental health treatment is not recommended for Nicole at this time". See (Exhibit 17 – Initial Suitability Assessment, dated May 20, 2021, Page 7).

COMPETENCY EVALUATIONS FOLLOWING ARREST

Following her arrest on June 1, 2021, Defendant was evaluated on June 15, 2021, to determine competency by of North Florida Psychological Services, Inc. This evaluation outlined that Defendant's "Full-Scale IQ of 74, a result which is consistent with the 04-percentile rank when compared to others of Nicole's age reference group, and which is indicative of borderline intellectual functioning...With one exception, all of Nicole's subtest scores are below normative standards." It is important to note that testing revealed:

Nicole earned Average scores on six of the subtests administered her from the standard WISC-V battery. These results are revealed on three assessments of visual-analytic skills, as well as on a test of auditory working memory on which she was required to repeat numbers forwards, backwards and in sequence. A Low Average score is also revealed on a test of visual working memory. Nicole earned a Borderline score on an assessment of abstract reasoning and concept formation on which she was asked to assign similarities to pairs of words. A Borderline score is also revealed on an assessment of word knowledge and usage...the

WRAT-5 indicates that Nicole is reading at approximately a fourth-grade level, or well below age and grade norms... Nicole was administered the Beck ~~Depression~~ Inventory-II (BDI-II) to assess her present ~~psychological~~ state. The BDI-II is a multiple-choice instrument which consists of 21 multiple choice items and assesses the presence of symptoms of a clinical ~~depression~~ among adolescents and adults. Nicole obtained a total score on the BDI-II which is consistent with a Severe ~~depression~~... Nicole obtained a Very Low score on the Total Scale of the Piers-Harris 3 that is the best single measure of a young person's level of self-regard.

The Trauma Symptom Checklist for Children (TSCC) is a self-report instrument which measures ~~traumatic~~ distress and related ~~psychological~~ symptomatology. The TSCC is used in the evaluation of children and adolescents who have a history of traumatic events, including physical or sexual victimization, major losses, being exposed to violence and natural disasters. The structure of the TSCC includes two validity scales: Underresponse and Hyperresponse. There are six clinical scales: ~~Anxiety~~, ~~Depression~~, ~~Anger~~, ~~Posttraumatic Stress~~, ~~Dissociation~~, and ~~Sexual Concerns~~. Nicole obtained scores within the Average range on both the Underreporting and Hyper reporting scales of the TSCC, indicating that her profile is a valid one. Nicole's TSCC revealed elevated score on the ~~Depression~~, ~~Anger~~, ~~Posttraumatic Stress~~ and ~~Dissociation~~ scales. A High score on the ~~Depression~~ scale is found among children who see themselves as being bad and unworthy and who tends to harbor feelings of self-loathing. Elevated scores on the ~~Depression~~ scale are also associated with suicidal and self-injurious behavior. Children who score high on the ~~Anger~~ scale are often perceived by others as irritable, hostile, and aggressive. Frequently these children get into trouble at school or at home for fighting, having temper tantrums, talking back and the like. Children with elevated ~~Posttraumatic Stress~~ scores are often focused on traumatic events or experiences in their lives. These children often report being subject to intrusive, persisting recollections and a sense of re-experiencing these events. Symptoms include anxious distractibility and irritability, as well as posttraumatic rumination. An elevated score is also revealed on the ~~Dissociation~~ scale. This scale measures the extent to which the child experiences mild to moderate dissociative symptomatology, e.g., such as derealization, emotional numbing, daydreaming, memory problems and dissociative avoidance. Children with clinically significant scores on the Dissociation scale often experience reduced responsivity to their environments, emotional detachment, and a tendency to cognitively avoid negative affect. It is often the case that these children are seen by others as immersed in a fantasy life to the exclusion of the real world and its demands.

The results of adjunctive ~~psychological~~ testing reinforce the impression that Nicole is a very troubled adolescent. There are indications of a teenager who is clinically ~~depressed~~ and ~~anxious~~, her façade of implacability to the contrary. There are also indications that Nicole feels fundamentally, and perhaps existentially, as if she is an ~~isolated~~ person who feels ~~compellingly~~ ~~dissatisfied~~ with herself. Consistent with her poor academic history and ~~psychological~~ educational testing, the testing indicates that Nicole feels inferior in terms of her cognitive/academic capabilities. Testing also suggest that Nicole is experiencing many classical symptoms of a ~~Posttraumatic Stress Disorder~~. A follow-up assessment may be useful in determining to what extent her ~~PTSD~~ symptoms are the manifestation of her recent traumatic event which has resulted in her arrest, detention, and incarceration versus to what extent her symptom derive in part from her previous life experiences. Also of note, and which also warrants additional clinical exploration, is the disparity and incongruence of Nicole's self-report information and her self-presentation within the context of her diagnostic interview and the results of her ~~psychological~~ testing. Therein, Nicole essentially denied feeling ~~depressed~~, ~~anxious~~, or ~~traumatized~~ when asked about such, which is in stark contrast with her

indication on testing that she is experiencing many of the symptoms and signs of these disorders.

This evaluation reported that Defendant was admitted to Halifax Detention on May 12, 2021, reporting an overdose of the antidepressant drug Risperidone. At that time, it was also reported that Defendant "was experiencing both auditory and visual hallucinations" resulting in a diagnosis of:

~~Disruptive Mood Dysregulation Disorder and Bipolar Disorder...~~ The Suitability Assessment indicated that Nicole had established a pattern of sabotaging her placements and that she had not been doing well academically in spite of being provided with services through her IEP. Nicole had been seeing a licensed therapist from March 2020 through mid-April 2021. The therapist wrote a letter indicating that Nicole had done well with therapy until December 2020 when she began ~~decompensating~~, as reflected by episodes of ~~agitation, anger outbursts, paranoid thinking, and aggression~~. The therapist suggested that Nicole's deterioration could be linked to the onset of her ~~illness~~ which began in late November 2020. It was recommended that Nicole be admitted to a ~~high level placement~~ that could closely monitor her medication management and provide a higher level of counseling.

When evaluating Defendant's competency to stand trial, Defendant had a "questionable" rate of "appreciation of the range and nature of possible penalties", an "unacceptable" rate of "understanding the adversarial nature of the legal process", an "unacceptable" rate of "capacity to disclose to attorney pertinent facts surrounding the alleged offense", and an "unacceptable" rate of capacity to testify relevantly". Dr. Logan concluded that "Nicole is not considered to have the maturity, reasoning, or judgment to confer productively with her attorney or to assist in the preparation of a defense on her behalf. In a similar vein, Nicole is not deemed as having the capacity to testify in an informed and self-protective manner. In sum, Nicole is deemed as incompetent to proceed on the basis of mental illness". See (Exhibit 19 – North Florida Psychological Services, Inc, dated June 15, 2021).

On August 23, 2021, Dr. William R. Meadows, a forensic psychologist for the State, evaluated Defendant for competency.

At the onset of the evaluation, Nicole was informed that the evaluation was not confidential insofar as the information she shared could be included in a written report that would be submitted to her attorney, the Court, and the State Attorney's Office. Nicole exhibited a limited understanding of this notification but agreed to participate in an interview.

This statement supports Doctor Logan's conclusion that Defendant did not have the mental capacity at the time to grasp the concepts surrounding the legal proceedings of her case. During Dr. Meadows's evaluation, Defendant stated that she had attempted suicide just a few months prior to the incident and was admitted for a Baker Act. It was also reported that "her vocabulary and fund of knowledge were consistent with low

average intelligence." Dr. Meadows concluded that Defendant was ~~competent~~ to proceed. Under "treatment recommendations", Dr. Meadows explicitly states Defendant "should remain compliant with her ~~psychotropic~~ medications to maintain her current stability." See (Exhibit 21 - ~~William R. Meadows~~ Forensic ~~Psychological~~ Evaluation, dated August 23, 2021). This finding infers that for Defendant to remain ~~competent~~, she must maintain her current stability, which was achieved by taking her ~~psychotropic~~ ~~medications~~ that she was not taking the day of the offense.

One issue of note in the reliability of Dr. Meadows' opinion, contained in that August 23, 2021, evaluation, is that Defendant stated that "she was compliant with ~~Stimulants (ADHD)~~ and ~~Contraceptives (ADHD)~~ at the group home in the time leading up to offense." See (Exhibit 21 - ~~William R. Meadows~~ Forensic ~~Psychological~~ Evaluation, dated August 23, 2021, Page 5). This is directly contradicted in the report from FUMCH, where Defendant was residing at the time of the offense, stating that "Defendant did not have any ~~medication~~ on property on May 30, 2021." See (Exhibit 20 - FUMCH Daily Logs, dated May 30, 2021, Page 3). Dr. Meadows clearly did not read the FUMCH files stating that Defendant was not ~~medicated~~ with her ~~psychotropic medications~~ at the time of the offense. See (Exhibit 21 - William R. Meadows Forensic Psychological Evaluation, dated August 23, 2021 and Exhibit 22 - Suggestion of ~~incompetence~~ Incompetence to Proceed).

On October 12, 2021, Defendant was evaluated a second time by ~~D. James Logan~~ of North Florida

~~Psychological~~ Services, Inc which included the following assessments:

The General Ability Index (GAI) score was consistent with a Low Average range of ~~cognitive~~ ~~abilities~~. The GAI is computed from the composite indices absent the Working Memory and Processing Speed domains. Nicole's skills of literacy were evaluated with the Wide Range Achievement Test-5 (WRAT-5). Nicole obtained a Reading composite score of 76, consistent with her inherent cognitive abilities as measured by the WISC-IV. ~~Psychology~~ testing indicated that Nicole is a ~~disturbed adolescent~~. There were indications of ~~symptomatic~~ manifestations of a ~~Posttraumatic Stress Disorder~~.

A structured assessment of Nicole's competency with the Florida Juvenile Competency Assessment Procedure (FJCAP) indicated that Nicole was informed as to the substance and severity of the charges against her, although there were **reservations about her appreciation of the possible punitive sanctions and the range of consequences that might be imposed if adjudicated. Nicole was also deemed to have an unacceptable grasp of the adversarial nature of the legal process and its participants.** Specifically, Nicole did not report any knowledge about the plea-bargaining process. See (Exhibit 23 - North Florida ~~Psychological~~ Services, Inc, dated October 12, 2021)

~~Dr. Legum~~ concluded in his second report that “at present, Nicole has a satisfactory understanding of the substance and the seriousness of the charges against her, as well as their possible consequential nature...Nicole has the ability to testify in an informed and self-protective manner if called to the witness stand.” Dr. Legum offered the following diagnostic impressions:

- ~~Borderline Intellectual Functioning by testing;~~
- ~~Disruptive Mood Dysregulation Disorder;~~
- ~~Attention Deficit Disorder/Hyperactivity Disorder, by history;~~
- ~~Posttraumatic Stress Disorder, by history;~~
- ~~Unspecified Disruptive, Impulse Control and Conduct Disorder.~~

See (Exhibit 23 – North Florida ~~Psychological~~ Services, Inc, dated October 12, 2021).

* This was the last ~~competency~~ evaluation that was completed prior to the Nelson Hearing and Sentencing Hearing on January 27, 2023, almost **17 months later**. *

In *Reilly v. State (In re Reilly)*, 970 So. 2d 453, 455-456 (Fla 2d DCA 2007), the Court found “[w]hen considering whether a defendant is ~~competent~~ to proceed, the question for the trial court is ‘whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of ~~rational~~ understanding and whether he has a rational as well as factual understanding of the proceedings against him.’ *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (emphasis added); see also *Peede v. State*, 955 So. 2d 480, 488 (Fla. 2007); *Mora v. State*, 814 So. 2d 322, 327 (Fla. 2002); *Brockman v. State*, 852 So. 2d 330, 333 (Fla. 2d DCA 2003). Thus, the trial court’s focus must be on the defendant’s ~~mental~~ state at the time of the proceeding in question, not at some time in the past, and stale mental health reports will not support an adjudication of incompetency.

For example, in *Brockman*, the trial court based its competency determination on reports from two mental health experts who had examined Brockman four months and eleven months previously. 852 So. 2d at 333. This court held that the reports were stale and could not support the trial court’s finding of incompetence because they did not speak to Brockman’s present competence to proceed. *Id.* Similarly, in *LeWinter v. Guardianship of LeWinter*, 606 So. 2d 387, 388 (Fla. 3d DCA 1992), the court held that an examining committee’s report that was filed six weeks before the competency proceeding was not competent evidence of LeWinter’s present mental state and ability to care for himself.”

In *Reilly*, the Court ultimately found that the “six-month-old report did not, and could not, speak to Reilly’s present ability to consult with his lawyer with a reasonable degree of rational understanding or his present rational and factual understanding of the proceedings against him” and that “[w]hile we recognize that section 916.12(2) permits the trial court to adjudicate a defendant incompetent based on the stipulation

of the parties to one mental health expert's findings, we do not believe that section 916.12(2) permits the court to rely on a stipulation to an expert's report that is so stale that it no longer speaks to the defendant's present competence." *Id.*, at 456.

Clearly the conclusions within ~~Dr. Meadows~~'s August 23, 2021, evaluation and ~~Dr. Legum~~'s second evaluation from October 12, 2021, were "stale" as to Defendant's present ~~mental~~ state at the time of the ex-parte Nelson Hearing and Plea. These reports could not form a basis for the Court to find Defendant had a "present ~~rational~~ and factual understanding of the proceedings against [her]." In addition, the Courts have found, "[a] defendant's competency is not static and may change over even a short period of time." See *Lyons v. Luebbbers*, 403 F.3d 585, 593 (8th Cir. 2005) (noting that a district court must remain alert to changing circumstances that may indicate that a defendant who was competent at the commencement of trial has become incompetent). Thus, it is incumbent on the district court to base its competency determination on the defendant's current state of mind to the extent it is ascertainable from the information available. See *United States v. Jimenez-Villasenor*, 270 F.3d 554, 559 (8th Cir. 2001) (defining the test as "whether the defendant had 'a sufficient present ability to consult his lawyer'" (quoting *Vogt*, 88 F.3d at 591)).

While Defendant may have been ~~competent~~ during ~~Dr. Meadows~~'s evaluation and ~~Dr. Legum~~'s second evaluation, the Defendant's ongoing ~~competency~~, based on her ~~mental health~~ history and particular susceptibilities due to her age and circumstances around the case, needed to be monitored carefully. Where these reports could not speak to her ~~competency~~ at the time of the proceedings, they do give insight into her ~~mental~~ condition and the factors that would affect her continued ~~competency~~. Specifically, ~~Dr. Legum~~ found Defendant to have "~~borderline intellectual functioning~~" based on the testing that was conducted. ~~Dr. Legum~~ found the Defendant would put on an "air of implacability" hiding her ~~depression, nervousness~~, and other expressions of her ~~mental health~~ disorder. ~~Dr. Meadows~~ found Defendant needed to remain stable to maintain her ~~mental~~ state. And finally, even in finding Defendant ~~competent~~ in her October 12, 2021, evaluations, ~~Dr. Legum~~ opined there were "reservations about her appreciation of the possible punitive sanctions and the range of consequences that might be imposed if adjudicated. Nicole was also deemed to have an unacceptable grasp of the adversarial nature of the legal process and its participants".

ADDITIONAL MENTAL HEALTH EVALUATIONS

Following the finding of ~~competency~~, Defendant was evaluated by ~~Vanita [redacted] P. D.~~ on two (2) separate occasions, July 13, 2022, and September 1, 2022, at the Volusia County Jail. Per her report, Defendant was not taking her ~~psychotropic medications~~ three (3) months prior to the incident and on the day of the incident (This further challenges ~~Dr. Maldonado's~~ finding in his evaluation). Defendant had a history of being ~~diagnosed with~~ (since age five (5)) and at the time of the evaluation had been taking ~~Levamisole and Risperidol~~ for three (3) months. ~~Dr. [redacted]~~ stated that Defendant was ~~Baker Acted~~ "several times." Defendant's prior educational background eluded that she "failed the 4th and 5th grade" and she has a history of "~~Bipolar Disorder, Disruptive Mood Disorder, Oppositional Defiant Disorder, Schizophrenia, Attention-Deficit/Hyperactivity Disorder, and Emotional Incontinence~~." During the interview, it was noted that Defendant was "noteworthy for distractibility and she required frequent re-direction. Her speech and language were mildly pressured...Based on observations during this interview and her academic and vocational background, her estimated intelligence level is likely in the ~~borderline range~~." Defendant's test results from this ~~psychological~~ evaluation were as follows:

Results from the WAIS-IV indicate her overall intellectual functioning is in the borderline range (FSIQ = 79; 8th percentile). Her Verbal Comprehension is in the borderline range (VCI = 76; 5th percentile). Her Working Memory was in the borderline range (WMI = 71; 3rd percentile). Her Perceptual Reasoning was in the average range (PRI = 102; 55th percentile). Her Processing Speed was in the borderline range (PSI = 76; 5th percentile). It is noteworthy that at the time of the evaluation the results from her testing "place her overall intellectual function in the borderline range. Overall, her intellectual capacity is at the 8th percentile and 92% of her peers function at a higher level as compared with her functioning. Neuropsychological testing places her immediate memory and basic language skills in the extremely low range. Her basic attention is in the borderline range. Her delayed memory is in the low average range. Her visuospatial/constructional skills are in the average range.

~~Dr. Maldonado~~ went on to find:

Ms. Maldonado was an adolescent at the time of the offense in question. As noted in the literature relevant to adolescence, brain development and legal culpability, there are clearly issues in Ms. Maldonado's case with regard to youth and associated immaturity. The frontal lobe area known as the prefrontal cortex which controls the brain's most advanced functions changes significantly during adolescence. The necessary pruning of the gray matter to allow for increased myelination and expansion of the brain's operation occurs well into the early 20's in young adults. **Prior to and during this process, those brain areas which govern impulsivity, judgment, planning for the future, foresight of consequences and other characteristics that are associated with culpability are**

significantly less developed. Research suggests that the ages of 21 and later are more likely targeted ages in which the necessary brain development has occurred. See (Exhibit 18 – Valerie R. McClain Forensic Psychological Evaluation, dated July 13, 2022, and September 1, 2022)

Defendant had her final ~~psychological~~ evaluation on October 7, 2022, by ~~Dr. Sarah Vinson of Lorio Forensics~~, four (4) months prior to the ex-parte Nelson Hearing. The developmental factors that impacted Defendant's thought process and function are outlined in the psychological evaluation as follows:

The adolescent brain, particularly the frontal lobe, is underdeveloped and does not achieve full maturity until a person is well into their 20s. Longstanding neuroscience, and specifically, neuroimaging has illustrated the immaturity of the adolescent frontal lobe, a region of the brain that is central to cognitive functions such as judgment, problem-solving and planning, attention, emotional control, and behavioral reactions vs responses. **These decision-making deficits are most pronounced during emotionally overwhelming situations.** On the day of the incident, Nicole reported that she had no plan to leave her foster placement and, even after she did, had not thought through or planned the days with any specific intent. Effectively, Nicole's actions on the day of the instant case were likely an impulsive response to her emotional state and developmental inability to appreciate the magnitude of her actions and the potential consequences. In addition to the developmental immaturity conferred by her age, Nicole was also behind because she did not have a cognitively enriching or stable environment during critical developmental periods.

Nicole's early experiences of ~~neglect, physical and sexual abuse, dysfunctional family dynamics, and instability~~ adversely impacted her emotionally, ~~mentally, and behaviorally~~. These factors took their toll in the absence of needed professional ~~mental health~~ interventions or reparative periods of stability, safety and positive reinforcements. **As a result, her ability to effectively regulate her own emotions and lean socially acceptable behaviors, which was already impacted by her developmental immaturity, was greatly impaired.** Nicole experienced difficulty navigating many aspects of life, especially during emotionally charged situations. Her developmental immaturity and the ~~psychological and behavioral sequelae~~ of her unresolved trauma contributed to the poor decision-making during the events leading to the instant case. See (Exhibit 16 – Lorio Forensics, dated October 7, 2022).

ARGUMENT

Under Florida Rule of Criminal Procedure 3.211(a)(1), which codifies the *Dusky* standard of competency, the Court must determine "whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings." In a postconviction claim, the movant must allege specific facts showing that a reasonably competent attorney would have questioned competence to proceed. In making a determination about whether the movant has met this burden, a court may consider the totality of the circumstances, including: (1) the nature of the ~~mental illness or defect~~ which forms the

basis for the alleged ~~incompetency~~, (2) whether the movant has a history of ~~mental illness~~ or documentation to support the allegations; (3) whether the movant was receiving treatment for the condition during the relevant period; (4) whether experts have previously or subsequently opined that defendant was incompetent; and (5) whether there is record evidence suggesting that the movant did not meet the *Dusky* standard during the relevant time period. *Thompson v. State*, 88 So. 3d 312, 320 (Fla 4th DCA 2012).

Defendant has clearly established factual support for enumerated factors ~~one through four~~ of the “totality of the circumstances” inquiry laid out by the *Thompson* Court. Specifically, Defendant has a well-documented history of ~~serious mental health illnesses that were being treated during the relevant times~~ of the proceedings. Defendant had been diagnosed with ~~ADHD, ODD, Bipolar Disorder~~ going back to the age of nine (9). See (Exhibit 14 – DCF Special Conditions Assessment Summary, Page 9, dated December 12, 2016). Through multiple evaluations, ~~Dr. [redacted]~~ diagnosed Defendant with ~~“Borderline Intellectual Functioning by testing, [redacted] Mood Dysregulation Disorder, Attention Deficit Disorder/Hyperactivity Disorder by history, Post-traumatic Stress Disorder, Unspecified Disruptive Impulse Control and Conduct Disorder.”~~ See (Exhibit 23 – North Florida ~~Psychological Services, Inc~~, dated October 12, 2021). ~~Dr. Valeria McClain~~ provided Defendant’s diagnosis history of ~~“Bipolar Disorder, Disruptive Mood Disorder, Oppositional Defiant Disorder, Schizophrenia, Attention Deficit/Hyperactivity Disorder, and Emotional Behavioral Disorder.”~~ See (Exhibit 18 – ~~Farah McClain, Forensic Psychological Evaluation~~, dated July 13, 2022, and September 1, 2022). Finally, ~~Dr. Sarah [redacted]~~ described a diagnosis of ~~“Disruptive Mood Dysregulation Disorder, Attention Deficit Disorder, Posttraumatic Stress Disorder, Generalized Anxiety Disorder, Major Depressive Disorder, Oppositional Defiant Disorder, Borderline Intellectual Functioning Disorder, and Psychosis.”~~ See (Exhibit 16 – Lorio Forensics, dated October 7, 2022).

Defendant had been on ~~psychotropic medications~~ since the age of five (5) and had been prescribed and taken off numerous different ~~medications~~ attempting to treat her ~~mental health issues~~ as described in detail above. She continued to receive ~~psych medications~~ during her incarceration in the county jail up until the time of the ex-parte Nelson Hearing.

Defendant has previously been found ~~incompetent~~ to proceed based on her ~~mental illness~~ by ~~Dr.~~

~~Lorion Legum~~ of North Florida ~~Psychological~~ Services, Inc. See (Exhibit 19 – North Florida ~~Psychological~~ Services, Inc, dated June 15, 2021). While ~~Dr. Legum~~ would later find Defendant was ~~competent~~ to proceed, he would maintain that he had “reservations about her appreciation of the possible punitive sanctions and the range of consequences that might be imposed if adjudicated. Nicole was also deemed to have an unacceptable grasp of the adversarial nature of the legal process and its participants. Specifically, Nicole did not report any knowledge about the plea-bargaining process.” See (Exhibit 23 – North Florida ~~Psychological~~ Services, Inc, dated October 12, 2021).

Defendant would now show that there is specific record evidence that she did not have a rational understanding of the proceedings both during and after the ex-parte Nelson Hearing, to make a knowing and intelligent decision to enter a plea.

TESTIMONY FROM EX-PARTE NELSON HEARING, PLEA, AND SENTENCING:

ISOLATION AND THERAPIST

In her ~~forensic evaluation~~ report, ~~Dr. Sarah Vinson~~ reported that “Nicole categorizes herself as “a social person” and feels some relief when she can deviate from her daily isolated environment.” See (Exhibit 16 – Lorio Forensics, dated October 7, 2022). One of the issues addressed by the Court during the ex-parte hearing was that in the weeks preceding that hearing, Defendant was completely ~~isolated~~ at the jail as she was the only juvenile female in the facility at the time and had been placed on a ~~suicide watch~~. Florida Statute 916.107(4)(b) states that “Forensic clients shall be free from the unnecessary use of restraint or seclusion.”

During the ex-parte Nelson Hearing, Defendant pled for the Court’s help with her isolation at the jail:

THE COURT: ... You had something else you wanted to address?

MS. JACKSON: Yes. The solitary.

THE COURT: Yes, ma’am.

MS: JACKSON: So I’ve been in solitary confinement. They said that I’m in there for the better – to protect me or something, something. I don’t see that happening. I feel like it’s wrong, and they’re not letting the jail know that me being in solitary is not good. I go less outside. I take my showers -- I still -- I’m in the cell 24/7, basically, seven days a week. I only get to go outside three hours a week. But I was in solitary confinement without going outside for eight months. My attorney has not said a word about it. He said he didn’t -- there's nothing he could do...

MR. AVALLONE: Well, yeah, Judge...But the overall issue on the solitary – because we've considered it – is, first, she's not being held in solitary, you know, ... She's being held, though, alone... Also, she sees her therapist – at least since that order has been in place... But we've considered this solitary issue...She has been outside. She does have access to phones, tablets, and other ways to contact people. But those are the reasons why we took no action.

MS. JACKSON: They deny a lot of that for me. That's why I've been – I'm on ~~suicide~~
THE COURT: Who is "they"?

MS. JACKSON: The officers. I've been on ~~suicide watch~~ for a very long time because they hate me. They put me –

THE COURT: Are you on ~~suicide watch~~ now?

MS. JACKSON: Yes. They put me in there, and they want to torture me, basically. They said that I threatened to kill them. Like, I – Why would I threaten to kill somebody? It just doesn't make any sense.

So They have to – They put me in the chair, and they said they were going to beat my ass. The – one of the officers said that. She grabbed my hair, while they were putting the handcuffs on me, and threatened they were going to tase me. So I'm –

THE COURT: When did that occur?

MS. JACKSON: -- in an 8 x 5 cell, and they always –

THE COURT: Okay. Hold on. Take a breath... When did that occur?

MS. JACKSON: This whole -- these two weeks has been hell for me...

So you are currently on ~~suicide watch~~?

MS. JACKSON: Yes. Because of me banging on the door. Because they always deny my phone time and my tablet. So, no, I don't have access to the phone 24/7. There's other people in the rotundas, what they call it, in the segs. And I can't sleep in there. I get three hours of sleep in there. I get three hours of sleep because there's always movement. So, no, Mr. Avallone, I do not have 24 hours for the phones, and they shut off periods of times.

MR. AVALLONE: Her handling has been changed in the last two weeks, Judge....

MS. JACKSON: And I haven't been outside...

(Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 53 lines 22-25, Page 54 lines 1-12, 15, 18-22, Page 55 lines 17-18, 20-25, Page 56 lines 1-23, Page 57 lines 7-19, 23, Page 59 lines 3-9, 19-25, Page 60 lines 1-6, 10-14, 17-19, Page 61 lines 17-19)

Defendant would assert that she had been in isolation for weeks prior to the ex-parte Nelson Hearing where she was not able to speak to anyone but her attorneys. Aside from the ability to periodically shower, she was in her cell unable to sleep, causing her ~~mental~~ state to significantly deteriorate. Prior to this, she had been housed with another juvenile female, giving her the social interaction that she required to express herself, feel normal, and get relief from the stress of her criminal case. Once her cellmate left, she was left completely alone 24 hours a day with only minor breaks to meet with her counsel and discuss her impending trial date. Following the ~~suicide watch~~, she was denied even access to the phones and tablets. This led to depression, ~~anxiety~~, and a ~~desperation~~ to be out of the isolated environment. She repeatedly informed her

counsel about the toll this was taking on her and asked for their assistance in moving her to a place with other juveniles she could interact with. Following this plea for help, the Court inquired:

THE COURT: Okay. So are you still able to see your therapist?

MS. JACKSON: yes. But now, for some reason, she has to do – has to go home with a badge. She comes to the jail, and they have to clarify something. She has to go home, and then she has to wait 45 minutes, and they call for me.

THE COURT: ...How long have you – Are you seeing your therapist on a weekly basis?

MS. JACKSON: No. She's always on vacation.

THE COURT: Okay. How often do you typically see her?

MS. JACKSON: Every other week. It really depends.

THE COURT: And do you have a good – I don't need to hear what you-all talk about. Do you have a good relationship with this therapist?

MS. JACKSON: Um, well, she mostly talks about herself. But, yeah, I just sit there and listen, kind of.

THE COURT: ...I did enter an order to allow her to see a therapist. Is there – Can we, perhaps, address to see if we can get someone out there more regularly? That might help, kind of, put a damper on this high anxiety that's causing issues...

MR. AVALLONE...her perspective is that things are going well. And they meet regularly. But I will address that with her and see if she can go more often.

THE COURT: If you can do that. Especially, in light of Ms. Jackson being on suicide watch. That's concerning, obviously, to the Court.

See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 53 lines 22-25, Page 54 lines 1-12, 15, 18-22, Page 55 lines 17-18, 20-25, Page 56 lines 1-23, Page 57 lines 7-19, 23, Page 59 lines 3-9, 19-25, Page 60 lines 1-6, 10-14, 17-19, Page 61 lines 17-19)

In responding to the Court's inquiry, Defendant explained she was not seeing the therapist, that the public defender's office had retained, on a regular basis and that even when they were seeing each other, she did not feel the therapist was addressing her mental health issues. The Court went so far as to request that the therapist see Defendant "more regularly" in hopes this would address the "high anxiety that's causing these issues". As Dr. Meadow's found, one of the most important things to maintaining Defendant's mental health was going to be "stability". It is very clear from Defendant's testimony and the Court's inquiry, that her situation in the jail was anything but stable. This testimony should have indicated to the Court and Defense Counsel, that Defendant needed to be stabilized, needed to be allowed to socialize, and needed to regularly see a therapist before she made any serious decisions about the outcome of her case.

CONFUSION

In addition to the direct testimony about her ~~mental state~~, it is evident that during both the Nelson Hearing and the Sentencing Hearing, Defendant was having difficulty comprehending the questions asked and/or many of the statements made to her. This would be expected based on her well documented ~~mental health issues~~, as well as the results of her ~~forensic psychological testing~~ and evaluations. Despite the fact that Counsel was aware of these limitations ascertained from the ~~forensic~~ reports and his own interactions with her, he failed to ensure that the appropriate measures were taken to ensure concepts were explained to Defendant in such a way that she would understand and that she was given the time to consider them to ensure she understood the *significance* of her decisions.

In ~~Dr. Lewis Logan's~~ initial evaluation, he found:

Nicole identified her attorney by her lawyer's last name, although she could not reference her professional affiliation. When asked how she would like her case resolved, Nicole indicated that she wanted to get released from detention. Nicole was unable to identify what the role of the prosecutor/state attorney is in the legal process. **Nicole acknowledged that she does not know what a jury is, its purpose, or its function in the adjudicatory process. Nicole similarly acknowledged that she knows nothing about the plea-bargaining dialogue and its function in the resolution of cases or the parties who participate in that process.**

****However, the combination of Nicole's ~~immaturity~~ and her ~~impaired judgement and reasoning~~, as well as her deficits in knowledge about the legal process, are considered to limit Nicole's capacity to establish a meaningful and productive alliance with her attorney. Specifically, it is not believed at this juncture that Nicole has the knowledge or reasoning to appreciate her range of plea options and to select a plea that would be in her best interest. Relatedly, Nicole is not regarded as having the present ability to assist her attorney in the preparation of a defense on her behalf.**

It is submitted that **Nicole is capable of answering questions in court, as long as they are framed in a clear, straightforward manner, devoid of subjunctive clauses, double negatives, and the like. Nicole's below average intelligence, her lack of significant exposure to the legal system, as well as her impulsivity and impaired reasoning and judgement, are considered as factors which make it likely that Nicole will not shape her testimony self-protectively.** Not unexpectedly, Nicole admitted that she knows nothing about what perjury is or its consequence. Nicole is of the opinion that she can be compelled to testify in her case, acknowledging that **she knows nothing about her Fifth Amendment constitutional rights that protect against self-incrimination.** See (Exhibit 19 – North Florida ~~Psychological Services, Inc.~~, dated June 15, 2021).

While ~~Dr. Logan~~, would later find the Defendant competent to proceed, nothing in that subsequent report changed his opinion as to how Defendant needed to be questioned by the Court to ensure she was able to understand what was being explained to her.

In Dr. [REDACTED]'s report, she went through the results of her forensic testing, finding as

follows:

"It is noteworthy that at the time of the evaluation the results from her testing "place her overall intellectual function in the borderline range. Overall, her intellectual capacity is at the 8th percentile and 92% of her peers function at a higher level as compared with her functioning. Neuropsychological testing places her immediate memory and basic language skills in the extremely low range. Her basic attention is in the borderline range. Her delayed memory is in the low average range. Her visuospatial/constructional skills are in the average range."

See (Exhibit 18 – Valerie K. McClain Forensic Psychological Evaluation, dated July 13, 2022, and September 1, 2022)

In Dr. Sarah Vinson's report, she discussed Defendant's difficulty in answering questions and thinking rationally when placed in emotional or traumatic situations.

Nicole appears to answer each question to the best of her ability; however, her thoughts are circumstantial at times and tangential others. She exhibits flashes of irritability but exercises some self-awareness and is apologetic, as she questions her clarity and occasionally asks evaluators if she answered the question.

A survival mentality, one that is characteristically short-sighted, was nurtured in the absence of sufficient provision, guidance, and protection from those entrusted with her care.

Trauma has the potential to negatively alter a child's biological, psychological, and social functioning. Exposure to traumatic experience can increase a child's susceptibility to physical health conditions, emotion and mental distress, behavior problems, poor academic functioning, and difficulty conforming to dominant social standards that are often based on the experiences of people presumed to have their needs consistently met in stable family environments. **Childhood trauma sensitizes the fight or flight response system and further impairs youth's already limited ability (relative to adults) to think rationally and regulate emotions.** Consequently, the actions in a situation are more vulnerable to being shaped by misperceptions that are warped by poorly regulated emotions.
See (Exhibit 16 – Lorio Forensics, dated October 7, 2022).

During the ex-parte Nelson Hearing, a discussion about Defendant's current school grade level sheds light on her limited education.

THE COURT: All right. And you are almost 16. But you're still 15 today; correct?

MS. JACKSON: Yes, ma'am...

THE COURT... How far did you go in school?

MS. JACKSON My teacher hasn't come because I'm – She says I'm in ninth grade, but I don't believe her.

THE COURT: You don't believe her?

MS. JACKSON: No. She keeps giving me this – Yeah.

MR. AVALLONE: What grade level do you think you're at?

MS. JACKSON: Well, my teacher thinks third grade. Me, I'm supposed to be in ninth. I missed a grade. So I am in ninth.

See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 78, lines 1-5, 8-15, 20-24).

One final consideration as to Defendant's ability to understand the information from the ex-parte proceeding came from the observations of Defense Counsel. On June 1, 2022, Counsel wrote a letter to Defendant, while she was being held in the Volusia County Jail, outlining the charges in the case, her age as a factor, the State's plea offer, and the maximum penalty she was facing after trial. See (Exhibit 24 – Letter from Larry Avallone). This letter was introduced and discussed at length during the ex-parte Nelson Hearing. Defense Counsel explained why he wrote this letter and described how he needed to review information with Defendant so she would understand it:

MR. AVALLONE: So, as I've explained - both in the letter and in many meetings - because of the way the statutes read and -- Well, the Judge would have two options in her case; either juvenile sanctions, or a life sentence, and nothing in between. So regardless of the scoresheet, and what the scoresheet says, or what the numbers come to, there are no other options if she was convicted as charged. So the complaint about the scoresheet has only arisen -- And we've had -- We sat with actually the scoresheet manual, one time at the jail, Ms. Jackson and I, and we did our best. I did my best to explain to her about -- **These are complex issues. We're dealing with, you know, a 15 year old. These are complex issues, going through a scoresheet manual, Judge... So I don't fault her for not understanding. But the point is, we've been through this exercise at length, I can assure you, trying to have her understand how it all works. Which was part of the impetus for the letter, was to put it in writing so that she can spend time with that letter - because she has some learning disabilities that she needs to read and re-read things - to understand them...So that was part of the reason why I wrote everything down. Because the language in that letter is above her understanding, and I knew that. But I know that she - because we've spent so much time together - if she reads and re-reads things, she will understand it...So I believe she does understand it, to the extent she can understand what the scoresheet means;...we've been over the scoresheet to the best she can understand it. See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 63 lines 23-25, Page 64 lines 1-14, 19-25, Page 65 lines 1-2, 4-9, 24-25, Page 66 line 1, 4-5)**

Defense Counsel was clearly aware that based on her "~~learning disabilities~~", the ~~mental health disorders~~, Defendant needed to "read and re-read" documents explaining legal concepts so she could understand them "to the extent she [could]". Counsel was aware Defendant was in the "borderline range of intellectual functioning" based on the Forensic Evaluations. He was aware that ~~Dr. Vinson~~ had found that, "Nicole's learning and short-term memory deficits, in addition to her doodling, are common symptoms of individuals who struggle with attention and concentration." (Exhibit 16 – Lorio Forensics, dated October 7, 2022). He was privy to all of the reports and findings that were discussed in detail above. All this information established Defendant was not someone who could understand complex legal issues and make decisions without additional necessary time, outside of the stress of a courtroom setting, to consider them.

[REDACTED]

In addition, Counsel knew that questions to Defendant needed to be “framed in a clear, straightforward manner” and that her ability to think rationally could be affected by traumatic and emotional situations. Based on all of this, it was imperative that Defense Counsel ensure that questions and information was clear, short, and direct and that Defendant had adequate time to consider that information before making a legally significant decision in her case. The transcript of the ex-parte Nelson Hearing shows that these safeguards were not implemented and her struggle to understand what she was being told is evident.

During the hearing, the Court attempted to explain legal concepts as well as normal procedures in a criminal case to Defendant. Many of these explanations would have been difficult for an adult who was not familiar with the criminal justice system to understand, let alone a fifteen (15) year old, with “borderline intellectual functioning” as described by Dr. Legum, Dr. McClain, and Dr. [REDACTED]. Defendant needed questions “framed in a clear, straightforward manner, devoid of subjunctive clauses, double negatives, and the like”. There are many examples of lengthy complex explanations and descriptions throughout the ex-parte Nelson Hearing; one is the following statement by the Court, shortly before Defendant agreed to accept the State’s plea offer:

THE COURT: Okay. The way the State got to that plea offer was they changed the charges, or amended the charges. So if they changed it to Attempted First Degree Murder without the “Law Enforcement,” that would change the type of charge. Because there’s -- Because there’s a law enforcement officer involved and a firearm, that makes it one of the most serious offenses that you could be charged with. Okay? That’s what kicks you into that life with the minimum-mandatory category.

So their plea offer, which is a plea bargain, is if you take that, we’ll reduce the charges. We’ll give you a sentence that you would otherwise not get - you get less than what you would otherwise get if you were convicted at trial, and we’ll change the charge. See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 67 lines 1-17).

“We’ll reduce the charges”

Multiple times during the proceedings, Defendant asked for the Court to repeat things. This is consistent with her need to have things explained in clear and concise terms as well as her need to be able to consider and repeat them in her own mind to fully understand them.

THE COURT: And you understand that will entail doing that, perhaps, to your detriment – because we have to discuss any defenses you might have, and all of those confidential communications you have had with any of your lawyers. Do you understand that?

MS. JACKSON: Say that again, please? See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 8, lines 1-7).

THE COURT: And is this the person who has previously appeared in court and given statements to the press about your case?

→ The Judge is speaking as if she is a member of the prosecutor’s office

MS. JACKSON: Wait. Say that again. Sorry. See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 14, lines 10-13).

MS. JACKSON: Sorry?

THE COURT: That's all right. Mr. Avallone, you can, kind of, help her to get to the portion we are looking at. On page 3.

Mr. Avallone: Yes, Judge. She's there. See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 18, lines 3-7).

It was clear during the ex-parte Nelson Hearing, that Defendant did not understand what qualified someone to offer legal advice as well as the role of people in her pending cases in both Volusia and Flagler Counties. This was particularly relevant in Defendant's case as she was receiving legal advice from outside advocates and portions of the ex-parte hearing focused on the fact that these people were not lawyers, and she should not be listening to them. She also expressed concerns and confusion that she was not attending court in Flagler County and had received a failure to appear warrant while in the jail. Her confusion on these issues came up multiple times:

THE COURT: All right. He's not a licensed lawyer, is he?

MS. JACKSON: I'm not -- probably not. I have no clue.

THE COURT: Okay. And he did not go to law school; correct?

MS. JACKSON: Now, that, I don't know. He probably didn't go to law school. But he did study some type of law, guideline things. See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 15, lines 6-14).

THE COURT: Tell Ms. Jackson what your position is with the Public Defender's office so she understands why you're involved in that. See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 25 lines 3-5)

MS. JACKSON: Okay. So I had court – Let me find it. Okay. I had court somewhere last month or the other month...

THE COURT: Okay

MS. JACKSON: And I've never attended any of them. Only – And I got arrested for failure to appear. ... It just says I've been arrested for failure to appear. Now, Mr. Avallone has said I have nothing to worry about on that. Now, I believed him until I got – until an officer came to me, at 4:00 o'clock in the morning, and told me that I had been arrested for failure to appear, and I went to first appearance...

THE COURT: He represents you in Flagler.

MS. JACKSON: Yes. But he said that he has – He said that, basically, they have to get some type of conferment from Mr. Avallone. So Mr. Avallone is basically in that case too, even though he's not assigned to it. And Mr. O'Neal said he has to get some clarification from Mr. Avallone. That's why I know that they're working together on that... See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Pages 19, lines 11-25, Page 20, Lines 1-10).

Can the judge offer
Legal Advice?

Can the judge act as an
Agent for the prosecutor's office
SEE PAGE 20

Defendant expressed confusion related to the preparation of her scoresheet and her entitlement to discovery, showing that even after Counsel had explained these issues to her multiple times, she still was struggling to grasp the concept.

THE COURT: You raise issues about discovery and sentencing scoresheet.

MS. JACKSON: Mr. Avallone didn't explain to me that I can have my discovery with me. He just said I can watch it or -- No, that's a lie.

THE COURT: Take a minute.

MS. JACKSON: Sorry... Okay. Mr. Avallone said that... I can watch it and view it, like, documents, but I can't -- And I didn't know that I had access so I could have it in my cell until Matt Short told me I could have access to my discovery. I didn't even know the even topic of discovery, before he told me that I could have access to discovery, and that I was entitled to that. See (Exhibit 11 -- Transcript of Nelson Hearing, Plea, and Sentencing, Page 29 lines 11-15, 20-25, Page 30 lines 1-4).

THE COURT: Okay. So let's talk about your -- the discovery. One of the things I need to address. Have you seen -- You say, in your motion, you have not seen the actual footage of the shooting, the body cams. Have you now seen those?

MS. JACKSON: Well, I've been trying to get my attorneys to show me that. But they don't answer any of my text messages. So, like, a date. I haven't got a response. Mr. Avallone's computer keeps stopping. So -- See (Exhibit 11 -- Transcript of Nelson Hearing, Plea, and Sentencing Transcript, Page 34 lines 18-25, Page 35, lines 1-2).

MS. JACKSON: I don't even know the number when -- The last court date, you know how they're supposed to have a scoresheet set up already?

THE COURT: Okay.

MS. JACKSON: She was calculating, right in front of my eyes, the scoresheet. So...

THE COURT: OKAY. So -- And your concern is that you haven't been able to see a printed copy of a proposed scoresheet, to see if it's correct, or to look at the numbers?

MS. JACKSON: uh-huh.

THE COURT: Is that right?

MS. JACKSON: Yes.

THE COURT: All right. Mr. Avallone, do you want to address that?

MR. AVALLONE: Sure, Judge. So we've gone over in detail the exposures and, you know, the -- Well, you've seen the letter.

See (Exhibit 11 -- Transcript of Nelson Hearing, Plea, and Sentencing, Page 62 lines 3-20).

MR. AVALLONE: So focusing on the scoresheet, Judge. As we know, the scoresheet is, kind of, not material in this case -- at this stage, anyway -- because of the way we're positioned if she's convicted as charged. So that's the way I've approached this case.

THE COURT: All right. So, for Ms. Jackson's understanding -- because I clearly understand -- why is the scoresheet not so important, if she were to be convicted as charged?

See (Exhibit 11 -- Transcript of Nelson Hearing, Plea, and Sentencing, Page 63 lines 13-25)

THE COURT... In fact, she did receive discovery at the jail, ... and what sounds like to me is, like, a blank scoresheet that was given to her so she could see what the scoresheet looks like, in the context of the discussions that she had between her and her lawyer.

See (Exhibit 11 -- Transcript of Nelson Hearing, Plea, and Sentencing, Page 72, lines 9-15)

After numerous meetings with Counsel, as well as the ability to review Counsel's letter, Defendant still did not understand what she was facing if she was convicted at trial. See (Exhibit 24 – Letter from Larry Avallone). To attempt to assist her, Counsel provided Defendant with caselaw to show a juvenile could receive a life sentence, which only confused her more.

THE COURT: ...she, apparently, was still under the misimpression that she could not receive a life sentence. See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 63 lines 6-8)

MS. JACKSON: He said, um, that I could get life or juvenile sanctions.

THE COURT: Okay.

MS. JACKSON: But I thought that you said that you could do less or something. I don't remember...

See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing Transcript, Page 66, lines 13-17).

MS. JACKSON: Um, okay. So my attorneys gave me documents of the 17 year old that was sentenced to life.

THE COURT: This is the first case?

MR. AVALLONE: She's talking about case law.

THE COURT: Oh, okay.

MR. AVALLONE: So if I may, we found out that some of the legal advice that she's been given was that a juvenile can't be given a life sentence. And this is that -- that she's been given this misinformation.

THE COURT: Okay

Mr. AVALLONE: So we gave her, just totally unrelated to her case, Judge... totally unrelated to her charges... not the exact same, it doesn't have the law enforcement component...

MS. JACKSON: Well, the thing is that he actually hurt somebody. I didn't hurt anybody. And he was sentenced to life. So that doesn't make any sense... Basically, that they're trying to – They're trying to pressure me not to go to trial. Because the thing is, they're not saying that I – They're not – How do I say this.

THE COURT: Take a minute

MS. JACKSON: Sorry... He's serving a life sentence. But he hurt somebody, but the guy lived. He actually raped somebody too. I didn't hurt anybody. So for them to give me this case is – I feel like it's, kind of, threatening, just because he got a life sentence. The juries know that he hurt somebody. And I didn't hurt anybody.

See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 42 lines 11-25, Page 43 lines 1-4, 12-15, 20-25, Page 44 lines 6-12)

The Court acknowledged that the case law provided to Defendant was meant to help her understand what she was facing, as she was not understanding from their explanations, however she was viewing this

* as a scare tactic.

THE COURT: As to the issue of why she was given the case law related to some other juvenile sentences – excuse me, other life sentences that were imposed on juvenile defendants who were in adult court, the purpose of those documents were to try to educate Ms. Jackson on the

fact that, yes, the Court does have that authority to impose a life sentence under certain circumstances.

The Court understands that Ms. Jackson, unfortunately, received it as a scare tactic. See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 74, lines 18-25, Page 75, lines 1-2)

THE COURT: ... So, Mr. Avallone, on that topic, do you want to expand in any more depth to answer her concerns as to why you gave her that case law? It sounds like she perceives you gave it to her to scare her or threaten her... See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 46 lines 4-8)

ISSUES INVOLVING DEFENDANT'S OUTSIDE ADVOCATES, TRUST ISSUES WITH COUNSEL, AND EMOTIONAL PRESSURES

In addition to her comprehension problems, Defendant had well documented issues with trusting people as well as an enhanced fight or flight response when placed in emotionally charged situations. This is documented within the forensic evaluations as well as in her actions leading up to the ex-parte Nelson Hearing. Dr. Vinson outlined in her psychological evaluation regarding Defendant's distrust for authority, "Further, based on her life experiences, adults in authority could not be trusted to act in her best interest, treat her fairly, or keep her safe." Dr. Vinson went on to discuss the effects of emotional situations on her decision making: "As a result, her ability to effectively regulate her own emotions and learn socially acceptable behaviors, which was already impacted by her developmental immaturity, was greatly impaired. Nicole experienced difficulty navigating many aspects of life, especially during emotionally charged situations"; "These decision-making deficits are most pronounced during emotionally overwhelming situations"; and "Childhood trauma sensitizes the fight or flight response system and further impairs youth's already limited ability (relative to adults) to think rationally and regulate emotions". See (Exhibit 16 – Lorio Forensics, dated October 7, 2022). One of the major issues addressed in this hearing was the influence of civilian advocates who came out to support her during the pendency of the case. Defendant did not trust her Counsel but did trust these advocates who she believed were looking out for her best interest. While there may be questions about the accuracy of the information and advice they were providing, there is no question that Defendant was relying on them to advocate for her in this case. There were many discussions throughout the ex-parte Nelson Hearing about the influence and advice of the advocates.

THE COURT: Do you understand all of those documents, all of those statements, everything you may have given him now can be out in the universe?

MS. JACKSON: Yes, ma'am.

And thanks to the clerk of Court - So is this motion + the transcripts from the Lock down Nelson hearing)

These "Civilian Advocates" WERE Attempting to secure MS Jackson a paid private attorney. As they did in securing a private attorney in filing this 3.050 ineffective Counsel motion. The prosecutor, the court appear to want to rush the completion of this prosecution prior to a private attorney being secured.

THE COURT: Do you understand how that is bad for your case? See (Exhibit 11 - Transcript of Nelson Hearing, Plea, and Sentencing, Page 30, lines 3-8).

You may trust Mr. Short. I don't know the person. I will tell you this. If I were in your shoes, my worry would be he served time in prison. I don't know this person from Adam. But all of a sudden, he wants to be my best friend and help me in this case. Why would he want to do this? What is he looking to get out of it? Who is he in contact with who he might give that information to? See (Exhibit 11 - Transcript of Nelson Hearing, Plea, and Sentencing, Page 31, lines 4-11).

THE COURT: That's your choice, if you want to go down that road. I will tell you, if I were in your shoes, I would stay as far away from him as I could. See (Exhibit 11 - Transcript of Nelson Hearing, Plea, and Sentencing, Page 32, lines 20-23).

THE COURT... what a horrible result it would be for you if you really believed those people as opposed to listening to the advice of these attorneys, who are some of the best attorneys in the circuit, who do this kind of work on these serious cases all the time... So will you agree to listen to what they say...

MS. JACKSON: I have another thing that I've been wanting to say.

THE COURT: Okay. Answer my question first. Will you agree to stop relying on what these other people are telling you and really listen to your lawyers, who know what they are talking about?

See (Exhibit 11 - Transcript of Nelson Hearing, Plea, and Sentencing, Page 48 lines 22-25, Page 49 lines 1-2, 4-5, 7-12)

An issue Defendant was especially concerned about was whether she had been shot while she was prone, injured, and on the ground. She was concerned that she had not seen a camera angle that showed her being shot to either prove or disprove this. It makes sense that a 15-year-old would be concerned with whether they had been shot by police after they were already on the ground and not a threat. It is also understandable that someone who does not trust authority and suffered from extensive trauma would focus on this issue. However, when Defendant raised these concerns, they were quickly brushed aside as not bearing on her guilt or innocence.

MS. JACKSON: Because if they shot me and I was already down on the ground, that means I didn't have a shotgun. You know, it was by me but, um, then they -- they -- there's no reason to shoot me, basically. So they shot me for no reason. I -

THE COURT: So how is that, in your mind -- Let's assume that's true, so I can ask this question. If you had already been shooting at the police --

MS. JACKSON: Allegedly.

THE COURT: "If," that was my question. If you had been shooting at the police, and they shot you as, or after, you had been shooting at them, how is where you got shot important to your defense of having shot at police first? See (Exhibit 11 - Transcript of Nelson Hearing, Plea, and Sentencing, Page 37 lines 6-20).

Judge If, that was true - then the police engaged in unlawful deadly force - and that would explain why

the police, the prosecutors, and the court would want to avoid all of this being exposed during a public trial!!

Judicial Opinion / Bias?
"Best Attorneys in the Circuit"
Well there goes any fair review of having ineffective counsel

Judge providing legal Advice?

The Smoking gun - the real reason for this soon called "Nelson hearing" The hearing wasn't called to determine whether Jackson had ineffective counsel, it was called for the nefarious purpose of convincing Jackson to listen to her attorneys and take the plea agreement + sentence prior to her "Civilian Advocates", being able to see her private counsel

In truth this "information" would have been harmful to the police, prosecutor, public defender, and the court itself.

The Court went on to challenge the sources of this information and whether it would be admissible at trial, again calling on her to question the motives and how these advocates could hurt her by providing information to the State or the press. During Dr. Logan's first report, testing indicate that "Nicole obtained a Very Low score on the Total Scale of the Piers-Harris 3 that is the best single measure of a young person's level of self-regard." See (Exhibit 25 - Order Authorizing Administration of Psychotropic Medication and Exhibit 19 - North Florida Psychological Services, Inc, dated June 15, 2021) The Court's repeated admonishments to Defendant for relying on these outside advocates certainly seemed to have an impact on Defendant's psyche over the hour and a half hearing.

Regardless of whether Defendant should have trusted these advocates, it was clear that she did not feel her attorneys were defending her:

MS. JACKSON: Basically, that they're trying to -- They're trying to pressure me not to go to trial. Because the thing is, they're not saying that I -- They're not -- How do I say this.

THE COURT: Take a minute. See (Exhibit 11 - Transcript of Nelson Hearing, Plea, and Sentencing, Page 42 lines 20-24)

MS. JACKSON: So there's slander going on about me from Sheriff or Deputy Chitwood, and saying that I burned down a halfway house, and there was puppies, and, you know, just stuff like that. My lawyers are holding back. They're not -- They're supposed to be defending me. They haven't said anything about, you know, that -- what he is saying. It is wrong, the puppy parts and burned down a halfway house. My lawyer has not said anything about that, and they refuse to talk to the media. See (Exhibit 11 - Transcript of Nelson Hearing, Plea, and Sentencing, Page 48 line 17 to Page 49 line 2)

After Defendant questions the motives of her Counsel, as well as what she could receive after Trial, the Court gives a pointed rebuke as to what she was facing:

THE COURT: Okay. So, Ms. Jackson, you need to hear loud and clear from me, who would be the judge who would sentence you. If you are convicted as charged, if you were sentenced as an adult as opposed to imposing juvenile sanctions, then I can impose a life sentence. I have the legal authority to do so... This is the Judge who would sentence you... See (Exhibit 11 - Transcript of Nelson Hearing, Plea, and Sentencing, Page 46 lines 24-25, Page 47 lines 1-5,15)

Threat!?

SUDDEN CHANGE IN DECISION

At the end of the Nelson portion of the ex-parte hearing, the Court began to break down the State's offer:

THE COURT: So the plea offer was a -- in essence - I'm not giving you all the details. But,

Of the falsehood by Sheriff Mike Chitwood that the children directed military gunfire (AK-47) at the deputies

MORE EVIDENCE OF THE COURT ACTING AS AN AGENT FOR THE PROSECUTOR

The transcripts of this "Nelson hearing" were sealed by the judge - not to protect Jackson's Rights, but to cover up the court's misconduct!!

34 She also appears to be the judge that has no problem acting as an agent for the prosecutor.

basically, a 20-year sentence --

MS. JACKSON: And 45 years probation.

THE COURT: -- with 45 years probation. See, you got it out before I even finished my sentence. So you know what it is.

MS. JACKSON: I will never forget it. Trust me. See (Exhibit 11 - Transcript of Nelson Hearing, Plea, and Sentencing, Page 66 lines 17 to 25)

Despite the clear statement that she could "never forget" the State's Offer, which had been available for over a year prior to being revoked at the last court date, and which she had rejected as unfair numerous times, Defendant suddenly and without warning changed her mind in the following exchange:

MS. JACKSON: Because now I think of it, taking advice, going to trial is -- Especially because now this -- Do you know what I mean?

THE COURT: All right. So I'm reading between the lines. You're telling me you want to reconsider that plea offer?

MS. JACKSON: Yeah. Because now that I know that this is just complete bull crap, and taking -- Because they -- My supporters are the reason why I wanted to go to trial. But now that I know -- Now that I see that there's something wrong with this guy, you know, there's something -- You know what I mean? You get what I'm trying to say?

THE COURT: I understand what you're saying.

MS. JACKSON: I'm probably trying to reconsider trial.

See (Exhibit 11 - Transcript of Nelson Hearing, Plea, and Sentencing, Page 69 lines 6 to 19)

This statement came almost out of nowhere in the immediate aftermath of her expressing concerns that she had not seen videos about whether she had been shot while on the ground, her Attorneys pressuring her not to go to trial, and her attorney not defending her from the Sheriff's false allegations. Defendant would assert that this reaction was a result of her giving up on her ability to advocate for herself, the emotional reaction to learning her advocates may have been working against her, and her desperation to be done with the case and out of the isolation at the jail. When she lost confidence in the people she trusted, and felt that the Court and her Counsel were minimizing her concerns, her "fight or flight" response, described by ~~D. Scott Wilson~~, kicked in, and her mind set shifted to how could she get out of the situation and more importantly out of the Volusia County Jail.

MS. JACKSON: Will I be able to sign today?

THE COURT: Well, if that's what you, ultimately, decide to do, you could.

MS. JACKSON: Would I be able to get sentenced today instead of...

(Exhibit 11 - Transcript of Nelson Hearing, Plea, and Sentencing, Page 70 lines 13 to 17)

Even after Defense Counsel stated that "The State has agreed to have sentencing occur today", Defendant still continued to ask, "Will I be sentenced today?", showing her single mindedness as well as

Court/Judge was - while Acting
As a defacto Agent for the prosecutor was successful
twisted the arm of a 15 year-old child into accepting
A plea deal that she has on several occasions rejected

her confusion. See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 83, lines 21-22, Page 105, line 9).

What should have set off immediate red flags is how completely her demeanor changed in the wake of the statement that she now wanted to accept the plea. She shifted completely from “never forget[ting]” the offer for how unreasonable she viewed it, to being thankful for it.

Ms. Jackson, we've, sort of, addressed that already in our discussions. Do you understand now that that plea offer was because the State amended the charge?

MS. JACKSON: And it's a good thing they did, because they have evidence against me. They didn't even have to make a plea offer. See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 75 line 21 to 76 line 2)

MS. JACKSON: Yes, ma'am. It gave me full mindset now about trial.

THE COURT: All right. Well, that's, ultimately, your decision. That's not my decision. My intent wasn't to make you make a decision. That's something you have to talk to your lawyers about and decide.

See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 79 lines 16-22)

CONTINUED CONFUSION DURING THE PLEA AND SENTENCING

Once the Court opened the courtroom and ended the sealed portion of the proceeding, Defendant continues to show confusion about many of the legal concepts and sentence, but remained steadfast in resolving the case as quickly as she could.

THE COURT: That's all right. There's a lot going on. I'm going to give you a few moments before we open the courtroom. It's going to take everyone a few moments to get set up, which they need to have time to do so. But I want you to talk to your attorneys, to make sure you understand that in order for me to accept your pleas on the Flagler County cases, you will have to withdraw your motion to discharge your lawyers in that Flagler case as well.

MS. JACKSON: Okay.

THE COURT: Do you understand that?

MS. JACKSON: No. Can repeat that, please?

See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 89, lines 22-25, Page 90, lines 1-10).

During the Sentencing Hearing, the Court asked Defendant what grade she completed prior to being incarcerated and her response was, “Sixth grade.” See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 103, line 19). This statement was contradicted by her earlier statement that “I'm supposed to be in ninth. I missed a grade, So I am in ninth” as well as the evaluation from ~~Dr. Logan~~ when

Defendant stated that "Nicole reports that she was in the seventh grade this past academic year" on June 15, 2021. See (Exhibit 19 – North Florida Psychological Services, Inc, dated June 15, 2021).

In addition, at the time of sentencing, Defendant was not aware if she was a US citizen:

THE COURT: All right. You understand that if you are not a U.S. citizen, you will be deported?

MS. JACKSON: Do what?

THE COURT: Do you understand that if you are not a U. S. citizen, you will be deported?

MS. JACKSON: Am I a U.S. citizen?

MR. AVALLONE: See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 105, lines 14-20).

She was not aware of where she would be housed after entering the plea:

MS. JACKSON: Will I be -- Will I be thrown in prison with everybody else, or will I be going to, like, some juvenile place until I'm 18?

See (Exhibit 11 – Transcript of Nelson Hearing, Plea, and Sentencing, Page 106, lines 12-14).

She was not aware of her right to a predisposition assessment prior to the sentencing:

THE COURT: Okay. And, Ms. Jackson, you have the right typically to have a predisposition report - which is, like, sort of, an investigative report about your history - that's usually done in juvenile court. You have the right to have that done because of your age; and you –

MS. JACKSON: A what?

THE COURT: It's called a predisposition report, or it's referred to as a PDR.

MS. JACKSON: Oh, that goes in sentencing.

THE COURT: Yes.

MS. JACKSON: No, I didn't want it.

THE COURT: Okay. You have the right to have that.

See (Exhibit 2 – Nelson Hearing and Sentencing Transcript Page 110, lines 13-25, Page 111, line 1).

She did not understand what a no contest plea was:

THE COURT: And do you understand what a no-contest plea means?

MS. JACKSON: Huh-uh.

THE COURT: All right.

MS. JACKSON: I have no clue.

See (Exhibit 11 – Nelson Hearing and Sentencing Transcript, Page 112, lines 4-8).

While ultimately, Defendant would state:

THE COURT: Do you have any kind of ~~mental health~~ issues, right today, as you are before me, that is causing you to have confusion or interfere with your understanding of what you're doing here this morning?

MS. JACKSON: Um, my mind is clear right now, But I do have some ~~mental~~ problems with ~~anger, anxiety,~~ and just more like that.

THE COURT: Okay. That's fair enough. Do those issues cause you any confusion about what you're doing here today?

MS. JACKSON: No, ma'am.

THE COURT: Have you had enough time to discuss this plea agreement with your lawyers –

MS. JACKSON: Yes, ma'am. See (Exhibit 11 – Nelson Hearing and Sentencing Transcript, Page 103, lines 11-25).

Defendant would assert that, while she agreed during the colloquy that she did not have confusion about what she was doing in entering a plea and had adequate time to speak to her attorney, in fact she had been overwhelmed during the emotionally charged ex-parte Nelson Hearing. That she had been in "hell" for the preceding two (2) weeks based on her total isolation on ~~outside~~ watch in the Volusia County Jail. She had not been seeing her ~~therapist~~ regularly and when they did meet, they had not been discussing her circumstances. When she went to the hearing and had her trust in her outside advocates called into question, her concerns about the issues she perceived in her representation undermined, and when she was provided all this information she did not understand, she simply broke and could only do what she could to get out of the situation. She felt she had no option but to take the plea offer. A plea offer that she had repeatedly rejected over the preceding year. This was not a knowing and voluntary decision, but rather a reaction to the stress, confusion, and desperation she felt during the hearing. It was only with the ability to reflect, that she understood the information she had been provided and what had occurred during the ex-parte hearing. Had she been given the opportunity to fully consider the implications of her plea, as well as the information she was provided, she would not have entered a plea but would have proceeded to trial.

Defendant would certainly admit that Defense Counsel was put in a very difficult situation. They were dealing with a high-profile case involving a 14-year-old girl with ~~major trauma~~ and ~~mental health issues~~. A Defendant who by their own admissions had difficulty understanding legal concepts; needing things repeated over and over to grasp them. They had to deal with a State Attorney's Office aggressively prosecuting the case and offering a very severe sentence in light of their client's age and background as well as the resolution of the Co-Defendant's case. They had to deal with outside influences that had earned Defendant's trust and were advising her in ways contrary to their own advice. Also, while they met with Defendant weekly, attempting to walk her through many of the complex issues in the case, she continued to have issues in trusting their motive and how they advocated for her; especially as it related to the jail and

Real
The purpose of the "Nelson hearing"

[REDACTED]

the statements of the Sheriff. While the State would not budge on their severe plea offer, Counsel still viewed this as a preferable alternative to going to trial on charges that would require a life sentence. Taking all of this into account during the ex-parte Nelson Hearing, Defense Counsel, after defending their decisions and representation, was faced with a total change in demeanor where Defendant shifted from hostility towards the offer to being thankful and wanting to accept it, and move immediately into sentencing as quickly as possible. Defense Counsel let the Defendant steer the ship to this immediate resolution without raising any concerns and therein lies the issue.

Defense Counsel provided ineffective assistance of counsel when, knowing what they knew about Defendant's ~~mental health~~ history and difficulty in understanding without time to consider, they failed to continue the proceedings to allow Defendant to consider the information she had received over the hour and a half of the hearing, meet with a ~~therapist~~ meet with Counsel, and give her time to reflect on the most important legal decision of her life. Defendant's evaluations and forensic testing showed that she required significant time to process concepts due to her "~~limited intellectual functioning~~." She needed things explained to her in simple, clear language and struggled to operate in emotionally charged situations based on her history of ~~trauma~~. Counsel had witnessed many of these issues in their interactions with Defendant. It was incumbent on them, against Defendant's assertions, to continue the proceedings with trial still thirty (30) days out, to meet with Defendant to give her the time to process all of the information she had received, ask the additional questions she needed to ask, and meet with ~~mental health~~ professionals to allow her to make an informed decision.

Under the factors provided by the Court in *Thompson v. State*, 88 So. 3d 312, 320 (Fla 4th DCA 2012), Defendant's ~~mental health~~ history supports factors one (1) through four (4) as argued above. In addition, the record evidence from the ex-parte Nelson Hearing suggested multiple times that the movant did not meet the *Dusky* standard during the relevant time period of the hearing. These statements, in light of the forensic ~~psychological~~ testing and findings within the evaluations, should have led reasonably competent counsel to question her ~~competency~~ to proceed.

Defendant was prejudiced by her Counsel's failure to continue the proceedings, give her time to consider the offer in light of the information from the ex-parte hearing, have her seen by a ~~therapist~~ and

have her evaluated by a forensic psychologist before she entered a plea as she did not have “rational, as well as factual, understanding of the pending proceedings.” Fla. R. Crim. P. 3.211(a)(1). Defendant had not had her competency evaluated in the seventeen (17) months prior to entering the plea. Competency is not static but may change over even a short period of time. The competency reports and evaluations provide insight into Defendant’s ~~condition~~ and the things that could affect her ability to understand legal proceedings. Specifically, (1) Defendant would put on an “air of implacability” hiding her depression, nervousness, and other expressions of her mental health disorder. This can be seen when she suddenly became enthusiastic about taking the plea. (2) That Defendant needed to remain stable to maintain her mental state. She was clearly not stable based on her isolation on suicide watch in the jail which the Court recognized was causing “high anxiety”. (3) Defendant’s “learning and short-term memory deficits, in addition to her doodling, are common symptoms of individuals who struggle with attention and concentration[.]” as well as her need to have questions “framed in a clear, straightforward manner” for her to understand. The questions and information at the ex-parte hearing were not framed in such a way and she clearly struggled understanding them. (4) Defendant’s “... ability to effectively regulate her own emotions and learn socially acceptable behaviors, which was already impacted by her developmental immaturity, was greatly impaired. Nicole experienced difficulty navigating many aspects of life, especially during emotionally charged situations” and “These decision-making deficits are most pronounced during emotionally overwhelming situations.” This was clearly a very emotionally charged situation for Defendant as she was told by the Court that the people she trusted may be working against her and that many of her concerns should not worry her. Finally, (5) Dr. Sarah Vinton described that Childhood trauma sensitizes the fight or flight response system and further impairs youth's already limited ability (relative to adults) to think rationally and regulate emotions” about Defendant. When all of these things are taken into account when viewed against her history, Counsel’s observations, her confusion at the ex-parte Nelson, her sudden change in demeanor, and her assertion in this Motion that this was not a knowing and intelligent plea, Defendant has established a reasonable probability that a new mental evaluation would have revealed that she was incompetent to enter a plea following the ex-parte Nelson Hearing.

CLAIM TWO

DEFENDANT, NICOLE MARIE JACKSON-MALDONADO, WAS DENIED EFFECTIVE REPRESENTATION OF COUNSEL WHEN HER ATTORNEY AFFIRMATIVELY MISADVISED HER AS TO HER MAXIMUM SENTENCE AND AVAILABILITY OF A YOUTHFUL OFFENDER SENTENCE BASED ON THE CHARGE CONTAINED IN THE INFORMATION

Defendant was denied effective representation of counsel when her attorney misadvised her that based on the charges in the Information Defendant was facing a life felony and was not eligible for a youthful offense sentence. Counsel specifically advised Defendant in a letter dated June 1, 2022, that "Count 1 is a life felony. This means that if convicted of this count, the Judge must sentence you to life in prison without the possibility of parole". Later in that letter, Counsel advised:

There is a sentencing scheme that would be very helpful to you. It is called youthful offender. Youthful offender applies to people who are 21 years of age or younger at the time the crime is committed. The Florida Statute specifically excludes any life felony from a youthful offender sentence. In short, this is not available to you because you are charged with a life felony in Count 1. See (Exhibit 24 – Letter from Larry Avallone).

At the ex-parte Nelson Hearing, Defendant raised concerns about not reviewing her Scoresheet, what Sentence she could receive after trial, and whether she would receive a mandatory life sentence. During this exchange, Defense Counsel was asked by the Court "why is the scoresheet not so important is she were to be convicted as charged?", Counsel responded:

MR. AVALLONE: So, as I've explained - both in the letter and in many meetings - because of the way the statutes read and -- Well, the Judge would have two options in her case; either juvenile sanctions, or a life sentence, and nothing in between. So regardless of the scoresheet, and what the scoresheet says, or what the numbers come to, there are no other options if she was convicted as charged. (Exhibit 11 – Nelson Hearing and Sentencing Transcript, Page 63, lines 1-6).

The Court did not attempt to clarify or correct Counsel's statement, rather reinforcing this legal advice by saying:

THE COURT: All right. So, Ms. Jackson, you wanted to chime in. You had a question, when Mr. Avallone was saying something about that there would be a mandatory. In essence, I would have no discretion. It would be a mandatory life sentence; and there would be a minimum-mandatory if you were found guilty as charged. (Exhibit 11 – Nelson Hearing and Sentencing Transcript, Page 65, lines 6-12).

It was immediately after these statements from her Counsel and Court, Defendant's demeanor suddenly changed, and the conversation turned to her accepting the State's offer. The State's offer of twenty (20) years in prison followed by probation was available to Defendant going back to at least the date of Counsel's letter, a year and a half before. See (Exhibit 24 – Letter from Larry Avallone). Defendant had

rejected that offer on multiple occasions and the offer had been withdrawn by the State prior to the ex-parte Nelson Hearing. Defendant would not have accepted that State's Offer if she would have known that she could have pled as charged and pursued a youthful offender sentence with the Court. As discussed in Claim One, Defendant had a significant amount of mitigation that could certainly have convinced the Court to impose a youthful offender sentence. Defendant was denied the ability to exercise her right to enter an open plea to the information and seek a youthful offender sentence based on Counsel's mis-advice that she could only receive "juvenile sanctions" or a "life sentence" "if she was convicted as charged".

According to Florida Rules of Criminal Procedure "defense counsel shall advise defendant of all pertinent matters bearing on the choice of which plea to enter and the particulars attendant upon each plea and the likely results thereof, as well as any possible alternatives that may be open to the defendant". Fla. R. Crim. P. 3.171(c)(2)(B). Unquestionably, a plea cannot be knowing and voluntary if the defendant does not understand all direct consequences of the plea, including those that affect the range of punishment. See *Murphy v. State*, 868 So. 2d 585, 586 (Fla. 2d DCA 2004) (citing *State v. Partlow*, 840 So. 2d 1040, 1042 (Fla. 2003); *Watrous v. State*, 793 So. 2d 6, 8-9 (Fla. 2d DCA 2001)). In *Ramos v. State*, 141 So. 3d 643 (Fla. 4th DCA 2014), the Court held "Counsel may be ineffective for failing to advise a defendant about the maximum possible penalty when conveying a plea offer. *Alcorn*, 121 So. 3d at 426 ("No party disputes that counsel's failure to advise a defendant of his or her exposure to an enhanced life sentence under Florida's HFO sentencing statute during plea negotiations amounts to deficient performance."); see also *Lester v. State*, 15 So. 3d 728, 732 (Fla. 4th DCA 2009); *McDowell v. State*, 905 So. 2d 999 (Fla. 4th DCA 2005); *Pennington v. State*, 34 So. 3d 151, 155 (Fla. 1st DCA 2010); *Williams v. State*, 924 So. 2d 897, 898-99 (Fla. 1st DCA 2006).

In the June 17, 2021 Information, Defendant was charged with Attempted Murder on a Law Enforcement Officer as follows:

COUNT I: NICOLE MARIE JACKSON-MALDONADO on or about June 1, 2021, in the County of VOLUSIA and State of Florida, did unlawfully attempt to commit murder in the first degree upon Deputy Anthony Ray and/or Deputy Donald Gray and/or Deputy Michael Sawicki and/or Deputy Nicole Richardson and/or Deputy Anthony Zimmerer and/or Sergeant Omar Bello and/or Sergeant William Maxwell and/or Deputy David Winhoven, knowing that Deputy Anthony Ray and/or Deputy Donald Gray and/or Deputy Michael Sawicki and/or Deputy Nicole Richardson and/or Deputy Anthony Zimmerer and/or

Sergeant Omar Bello and/or Sergeant William Maxwell and/or Deputy David Winhoven, was a law enforcement officer, while Deputy Anthony Ray and/or Deputy Donald Gray and/or Deputy Michael Sawicki and/or Deputy Nicole Richardson and/or Deputy Anthony Zimmerer and/or Sergeant Omar Bello and/or Sergeant William Maxwell and/or Deputy David Winhoven was engaged in the lawful performance of a duty or when the motivation for such attempt was related, all or in part, to the lawful duties of Deputy Anthony Ray and/or Deputy Donald Gray and/or Deputy Michael Sawicki and/or Deputy Nicole Richardson and/or Deputy Anthony Zimmerer and/or Sergeant Omar Bello and/or Sergeant William Maxwell and/or Deputy David Winhoven, by discharging and/or attempting to discharge a firearm towards Deputy Anthony Ray and/or Deputy Donald Gray and/or Deputy Michael Sawicki and/or Deputy Nicole Richardson and/or Deputy Anthony Zimmerer and/or Sergeant Omar Bello and/or Sergeant William Maxwell and/or Deputy David Winhoven, and in the course of committing said attempted murder did have in her actual possession a firearm, contrary to Florida Statutes 775.087, 782.04(1)(a)(1), 775.0823(2), and 777.04(1). (LIFE FELONY) (10/20 LIFE) See (Exhibit 1 – Information).

~~Although the parties believed that this offense was charged as a Life felony, such was not the case. It should be noted that there were no amended Information filed until January 27, 2023, when an amended information to a reduced charge was filed as part of the negotiated plea. See (Exhibit 3 – Amended Information). In order to fully develop this argument, we must dissect the original Information filed against Defendant.~~

First it must be noted that there is a substantive offense of Attempted Murder on a Law Enforcement Officer that is a Life felony and is found in Florida Statute 782.065 which reads as follows:

782.065 Murder; law enforcement officer, correctional officer, correctional probation officer.—Notwithstanding ss. 775.082, 775.0823, 782.04, 782.051, and chapter 921, a defendant shall be sentenced to life imprisonment without eligibility for release upon findings by the trier of fact that, beyond a reasonable doubt:

- (1) The defendant committed murder in the first degree in violation of s. 782.04(1) and a death sentence was not imposed; murder in the second or third degree in violation of s. 782.04(2), (3), or (4); attempted murder in the first or second degree in violation of s. 782.04(1)(a)1. or (2); or attempted felony murder in violation of s. 782.051; and
- (2) The victim of any offense described in subsection (1) was a law enforcement officer, part-time law enforcement officer, auxiliary law enforcement officer, correctional officer, part-time correctional officer, auxiliary correctional officer, correctional probation officer, part-time correctional probation officer, or auxiliary correctional probation officer, as those terms are defined in s. 943.10, engaged in the lawful performance of a legal duty.

Defendant was not charged with this Offense as the State elected to charge Defendant under the general murder statute found in Florida Statute 782.04(1)(a) which “is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.” See (Exhibit 1 -Information).

The State then elected to proceed under an attempt statute which is Florida Statute 777.04(4)(b) which reads as follows:

(b) If the offense attempted, solicited, or conspired to is a capital felony, the offense of criminal attempt, criminal solicitation, or criminal conspiracy *is a felony of the first degree*, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The offense of Attempted Murder in the First Degree under the general murder statute is a felony of the First degree punishable by thirty (30) years imprisonment. See *Weatherspoon v. State*, 214 So. 3d 578, 587 (Fla. 2017) (“Because premeditated murder is a capital offense, the attempt to commit the capital offense is a first-degree felony, which is punishable by no more than thirty years’ imprisonment. §§ 777.04(4)(b), 775.082(3)(b), 782.04(1)(a), Fla. Stat. (2016)”).

The offense of Attempted Murder in the First Degree can be reclassified pursuant to Florida Statute 775.087(1), if the State elected to allege in the information that: “during the commission of such felony the defendant carries, displays, uses, threatens to use, or attempts to use any weapon or firearm...” which in that case: “the felony for which the person is charged shall be reclassified as follows: (a) In the case of a felony of the first degree, to a life felony.” See Florida Statute 775.087(1). However, these elements must be charged in the Information in order for the Reclassification to apply. See *Espinoza v. State*, 264 So. 3d 343, 344 (Fla. 5th DCA 2019):

The statutory elements for such enhancement must be “precisely charged” in the information. *Lewis v. State*, 177 So. 3d 64, 65 (Fla. 2d DCA 2015) (quoting *Davis v. State*, 884 So. 2d 1058, 1060 (Fla. 2d DCA 2004)). “[I]f the state wishes to give notice of an enhancement by reference to a statute in the charging document, the state must refer to the specific subsection which subjects the defendant to the enhanced sentence.” *Bienaime*, 213 So. 3d at 929-30 (citing *Inmon v. State*, 932 So. 2d 518, 520 (Fla. 4th DCA 2006)). An information’s failure to cite to the specific statutory subsection, while simultaneously failing to precisely charge the elements, “cannot be cured by a jury’s factual findings.” *Id.* at 929 (citing *Altieri v. State*, 835 So. 2d 1181, 1183 (Fla. 4th DCA 2002)).

A thorough review of Defendant’s Information omits any reference to: “carries, displays, uses, threatens to use, or attempts to use any weapon or firearm” during the commission of the felony and fails to cite to the specific subsection of the reclassification statute, simply citing Florida Statute 775.087 without a subsection. Under the facts of this case, the charged offense is not reclassified as a matter of law.

The State did properly allege “Discharge” and “Actual Possession”; however, these elements only apply to the minimum mandatory elements of Florida Statute 775.087(2) and not reclassification under Florida Statute 775.087(1). See *Latimore v. State*, 288 So. 3d 1225, 1226 (Fla. 5th DCA 2020) (“Specifically, if the person “actually possessed” a firearm, the law requires that they “shall be sentenced to a minimum term of

imprisonment of 10 years...”) See also *Mendenhall v. State*, 48 So. 3d 740, 746 (Fla. 2010) (“If the defendant discharged a firearm during the commission of an enumerated offense, he or she “shall be sentenced to a minimum term of imprisonment of 20 years.” § 775.087(2)(a)(2), Fla. Stat.”)

Lastly, the State charged Florida Statute 775.0823(2) in the Information, which reflects as follows:

Violent offenses committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges.—The Legislature does hereby provide for an increase and certainty of penalty for any person convicted of a violent offense against any law enforcement or correctional officer, as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); against any state attorney elected pursuant to s. 27.01 or assistant state attorney appointed under s. 27.181; or against any justice or judge of a court described in Art. V of the State Constitution, which offense arises out of or in the scope of the officer’s duty as a law enforcement or correctional officer, the state attorney’s or assistant state attorney’s duty as a prosecutor or investigator, or the justice’s or judge’s duty as a judicial officer, as follows:

- (1) For murder in the first degree as described in s. 782.04(1), if the death sentence is not imposed, a sentence of imprisonment for life without eligibility for release.
- (2) For attempted murder in the first degree as described in s. 782.04(1), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

Florida Statute 775.0823 is not a reclassification statute and does not allow an “attempted” offense to be treated as if it were a completed offense. See *Graves v. State*, 248 So. 3d 1238, 1245 (Fla. 3D DCA 2018) (“But section 775.0823 contains no equivalent language that could reasonably be construed as reclassifying an attempted crime to a higher degree offense by treating it as if it were a completed crime. The “increase and certainty of penalty” language is a holdover from the originally-enacted version of the statute, and the only rational conclusion, based on the statute’s history as described herein, is that the continued presence appears to be an oversight in the legislative amendatory process.”) However, in the event that a court determines that the offense for which a defendant has been convicted was against law enforcement under Florida Statute 775.823, the Court may then impose a sentencing modifier as reflected within the scoresheet for that purpose. See *Thanonglit v. State*, 838 So. 2d 1261, 1262 (Fla. 2d DCA 2003):

“Chanpheng Thanonglit was convicted of attempted murder in the first degree. § 782.04(1), Fla. Stat. (2000). When imposing sentence, the trial court applied a law enforcement protection multiplier pursuant to section 921.0024(1)(b), Florida Statutes (2000), which provides: “Law enforcement protection: If the primary offense is a violation of the Law Enforcement Protection Act under s. 775.0823(2), the subtotal sentence points are multiplied by 2.5.”

When considering all of the language and statutes cited in the Information, Count One was charged as a felony of the first degree, punishable by a maximum or thirty (30) years, and not a life felony as Counsel

advised Defendant. In addition, despite what was contained in the letter, Defendant was eligible for a youthful offender sentence under the Information as charged.

The Qualifications for Youthful Offender Sentencing are as found in Florida Statute 958.04(1)(a-c) and are as follows:

- (1) The court may sentence as a youthful offender any person:
 - (a) Who is at least 18 years of age or who has been transferred for prosecution to the criminal division of the circuit court pursuant to chapter 985;
 - (b) Who is found guilty of or who has tendered, and the court has accepted, a plea of nolo contendere or guilty to a crime that is, under the laws of this state, a felony if such crime was committed before the defendant turned 21 years of age; and
 - (c) Who has not previously been classified as a youthful offender under this act; however, a person who has been found guilty of a capital or life felony may not be sentenced as a youthful offender under this act.

Defendant was charged with Attempted Murder on a Law Enforcement Officer under the general murder provisions of Florida Statute 782.04(1)(a) coupled with the attempt statute found within Florida Statute 777.04(4)(b), and was not charged under Florida Statute 782.065, which renders Attempted Murder on a Law Enforcement Officer a life felony. The offense of Attempted Murder in the First Degree under the general murder statute is a felony of the First degree punishable by thirty years imprisonment. See *Weatherspoon v. State*, 214 So. 3d 578, 587 (Fla. 2017). A felony of the first degree does qualify for youthful offender sentencing. See *Pacheco-Velasquez v. State*, 208 So. 3d 293, 295 (Fn. 4)(Fla. 3d DCA 2016) ("For sentencing purposes, robbery with a weapon is classified as a first-degree felony, not a life felony, and therefore such an offense is eligible for youthful offender treatment.") citing *Simpkins v. State*, 784 So. 2d 1203 (Fla. 2d DCA 2001); *Hill v. State*, 434 So. 2d 974 (Fla. 5th DCA 1983).

Although the State charged Ms. Jackson under the 10/20/Life provisions of Florida Statute 775.087(2) which requires mandatory minimum terms to be imposed, this would not preclude youthful offender sentencing. See *Burton v. State*, 304 So. 3d 1288, 1290 (Fla. 5d DCA 2020):

This court and other Florida appellate courts have held specifically that "the minimum mandatory provisions of the 10-20-life statute do not supersede the Youthful Offender sentencing provisions." *Darrow v. State*, 789 So. 2d 552, 553 (Fla. 5th DCA 2001) (citing *State v. Wooten*, 782 So. 2d 408, 410 (Fla. 2d DCA 2001)); accord *Gallimore v. State*, 100 So. 3d 1264, 1266-67 (Fla. 4th DCA 2012) ("[T]his plain language gives a trial court the discretion to impose a youthful offender sentence in lieu of the 10-20-Life

Statute's minimum mandatory sentence." (citing *Postell v. State*, 971 So. 2d 986, 989 (Fla. 5th DCA 2008); *Bennett v. State*, 24 So. 3d 693, 694 (Fla. 1st DCA 2009); *Wooten*, 782 So. 2d at 410)).

Defense Counsel provided ineffective assistance of Counsel when he misadvised Defendant that "Count 1 is a life felony. This means that if convicted of this count, the Judge must sentence you to life" and that youthful offender sentencing was "not available to you because you are charged with a life felony in Count 1". In fact, Count One was charged as a felony of the first degree and was eligible for a youthful offender sentence. Defendant was prejudiced as had Counsel properly advised her that she could enter an open plea to the June 17, 2021 and sought a youthful offender sentence, she would have done this and would not have accepted the State's offer of twenty (20) years in prison followed by forty-five (45) years of probation.

CONCLUSION

Based upon the forgoing facts, argument, exhibits, and citation to authority, the Defendant, NICOLE MARIE JACKSON-MALDONADO, has demonstrated that she was deprived of her right to the effective assistance of counsel and therefore this Honorable Court should vacate her Judgment and Sentence and allow Defendant to proceed to trial with the assistance of competent counsel, or in the alternative, order a full and fair evidentiary hearing with Defendant present and represented by counsel in order for Defendant to sustain her burden of proof under the law.

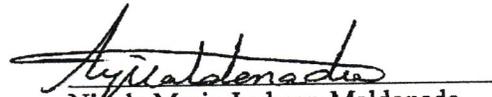
Respectfully Submitted,

//S// Dan Ripley

Dan Ripley, Esq., FBN 0070423
Attorney for the Defendant
Ripley Whisenhunt, PLLC
8130 66th St. N Suite 3
Pinellas Park, FL 33781
(813) 812-5294
efile@rightingwrongsflorida.com

Certification required by Rule 3.850 (n)(1)

I, NICOLE MARIE JACKSON-MALDONADO, under penalty of perjury, certify that I have read this motion or that it has been read to me and that I understand its content; that I read, write, and understand English; that the motion is filed in good faith and with a reasonable belief that it is timely filed, has potential merit, does not duplicate previous motions that have been disposed of by the court; and that all of the facts stated therein are true and correct.



Nicole Marie Jackson-Maldonado
Movant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court and electronically served via the State of Florida E-filing portal on the Volusia County Office of the State Attorney on this the 26th day of February 2025.

Respectfully Submitted,

//S// Dan Ripley
Dan Ripley, Esq., FBN 0070423
Attorney for the Defendant
Ripley Whisenhunt, PLLC
8130 66th St. N Suite 3
Pinellas Park, FL 33781
(813) 812-5294
efile@rightingwrongsflorida.com