

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JENNIFER MAE LEVIN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

**On Petition for Writ of Certiorari
to the Florida Fifth District Court of Appeal**

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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COUNSEL FOR THE PETITIONER

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IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

JENNIFER MAE LEVIN,
Appellant,
v. Case No. 5D18-234
STATE OF FLORIDA,
Appellee.

_____ /

Decision filed November 26, 2019

Appeal from the Circuit Court

for St. Johns County,
Howard M. Maltz, Judge.

Michael Ufferman of Michael Ufferman
Law Firm, P.A., Tallahassee, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Kristen L. Davenport,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

AFFIRMED.

EISNAUGLE, HARRIS, JJ., and STROWBRIDGE,
P.L., Associate Judge, concur.

IN THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY

State of Florida Division: 56

Division: 56

vs.

JENNIFER MAE LEVIN

Defendant

SSN: [redacted]

JUDGMENT

The defendant, JENNIFER MAE LEVIN, being personally before this court represented by JOEL N LEPPARD, MITCHELL STONE, AND LEWIS LOCKETT, the attorney of record, and the state represented by MITCHELL DAVID BISHOP, and having been tried and found guilty to the following crime(s):

<u>Count</u>	<u>Crime</u>	<u>Offense Statute</u>
1	RECKLESS DRIVING- DAMAGE TO PROPERTY	316.192 3c1

Deg of	<u>Case Number</u>	<u>OBTS</u>
<u>Crime</u>		
F M	16002071CFMA	5504006617

<u>Count</u>	<u>Crime</u>	<u>Offense Statute</u>
6	DUI MANSLAUGHTER	316.193 3c3a

Deg of	<u>Case Number</u>	<u>OBTS</u>
<u>Crime</u>		
S F	16002071CFMA	8888888888

X and no cause being shown why the defendant
should not be adjudicated guilty, IT IS ORDERED

THAT the defendant is hereby ADJUDICATED
GUILTY of the above crime(s).

X and being a qualified offender pursuant to s.
943.325, the defendant shall be required to submit
DNA samples as required by law.

____ and good cause being shown, IT IS ORDERED
THAT ADJUDICATION OF GUILT BE WITHHELD.

DONE AND ORDERED in open court in St. Johns
County, Florida, this Friday, January 19, 2018.

[signature of Judge Maltz]

HOWARD M. MALTZ, Circuit Court Judge

SENTENCE

(As to Count I)

The defendant, being personally before this court, accompanied by JOEL N LEPPARD, MITCHELL STONE, AND LEWIS LOCKETT, the defendant's attorney of record, and having been adjudicated guilty herein, and the court having given defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause bring shown (check one if applicable)

____ and the Court having on _____ deferred imposition of sentence until this date.

____ and the Court having previously entered a

judgment in this case on _____ now resentences the defendant.

_____ and the Court having placed defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

It Is the Sentence of the Court That:

_____ The defendant pay a fine of \$ _____, pursuant to section 775.083, Florida Statutes, plus \$ _____ as the 5% surcharge required by section 938.04, Florida Statutes

_____ The defendant is hereby committed to the custody of the Department of Corrections.

X The defendant is hereby committed to the custody
of the Sheriff of St. Johns County, Florida.

 The defendant is sentenced as a youthful offender
in accordance with section 958.04, Florida Statutes.

**To Be Imprisoned (Check one; unmarked
sections are inapplicable):**

 For a term of natural life.

X For a term of 364 DAYS as to each count above.

 Said SENTENCE SUSPENDED for a period of
 subject to conditions set forth in this order.

If “split” sentence, complete the appropriate paragraph.

____ Followed by a period of _____ of community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____ However, after serving a period of _____ imprisonment in, _____ the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period _____ of under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

SENTENCE
(As to Count VI)

The defendant, being personally before this court, accompanied by JOEL N LEPPARD, MITCHELL STONE, AND LEWIS LOCKETT, the defendant's attorney of record, and having been adjudicated guilty herein, and the court having given defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause bring shown (check one if applicable)

____ and the Court having on _____ deferred imposition of sentence until this date.

____ and the Court having previously entered a

judgment in this case on _____ now resentences the defendant.

_____ and the Court having placed defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

It Is the Sentence of the Court That:

_____ The defendant pay a fine of \$ _____, pursuant to section 775.083, Florida Statutes, plus \$ _____ as the 5% surcharge required by section 938.04, Florida Statutes

X The defendant is hereby committed to the custody of the Department of Corrections.

The defendant is hereby committed to the custody of the Sheriff of St. Johns County, Florida.

The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To Be Imprisoned (Check one; unmarked sections are inapplicable):

For a term of natural life.

For a term of 15 YEARS as to each count above.

Said SENTENCE SUSPENDED for a period of
 subject to conditions set forth in this order.

If “split” sentence, complete the appropriate paragraph.

____ Followed by a period of _____ of community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____ However, after serving a period of _____ imprisonment in, _____ the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period _____ of under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

SPECIAL PROVISIONS

(As to Count I & VI)

By appropriate notation, the following provisions apply
to the sentence imposed:

Other Provisions:

Retention of Jurisdiction

 The court retains jurisdiction over the defendant
pursuant to Jurisdiction section 947.16(4), Florida
Statutes (1983)

Jail Credit

 X It is further ordered that the defendant shall be
allowed a total of 34 days as credit for time
incarcerated before imposition of this sentence.

X Your Driver's License is Suspended

X Revoked for LIFE Day(s) Month(s)

 Year(s) Pursuant to 322.055. The Court
has directed the department to issue a license for
driving privileges restricted to business or employment
purposes only, as defined by s. 322.271, if the person is
otherwise qualified for such a license. Please know that
in no case shall a restricted license be available until
6 months of the suspension or revocation period has
expired.

Other:

X 4 YEAR MIN/MAND ON CT VI

 TIER Program.

Restitution:

 No restitution ordered.

Restitution Ordered. To be paid in accordance with
separate Restitution Order.

 Jurisdiction is reserved to determine restitution
upon motion of the State.

Credit for Time Served In Resentencing after Violation
of Probation Or Community Control

 It is further ordered that the defendant be allowed
 days time served between the original date of
arrest as a violator following release from prison to the
date of resentencing. The Department of Corrections
shall apply original jail time credit and shall compute
and apply credit for time served and unforfeited gain
time previously awarded on case/count (Offenses
committed before October 1, 1989).

 It is further ordered that the defendant be allowed

____ days time served between date of arrest as a violator following release from prison to the date of re-sentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on case/count (Offenses committed between October 1, 1989, and December 31, 1993).

____ The Court deems the unforfeited gain time previously awarded on the above case/count forfeited under section 948.06(7).

____ The Court allows unforfeited gain time previously awarded on the above case/count. (Gain time may be subject to forfeiture by the Department of Corrections under section 944.28(1)).

It is further ordered that the defendant be allowed
 days time served between date of arrest as a
violator following release from prison to the date of
re-sentencing. The Department of Corrections shall
apply original jail time credit and shall compute and
apply credit for time served only pursuant to section
921.0017, Florida Statutes, on case/count (Offenses
committed on or after January 1, 1994)

Consecutive/Concurrent As To Other Counts

 It is further ordered that the sentence imposed for
this count shall run (check one)
 Consecutive to X Concurrent with sentence set
forth in count 1 of this case.

Consecutive/Concurrent As To Other Convictions

 It is further ordered that the composite term of all

sentences imposed for the counts specified in this order
shall run (check one) consecutive to concurrent
with the following: (check one)

Any active sentence being served.

Specific sentences: _____ .

In the event the above sentence is to the Department
of Corrections, the Sheriff of St. Johns County, Florida,
is hereby ordered and directed to deliver the defendant
to the Department of Corrections at the facility
designated by the department together with a copy of
this judgment and sentence and any other document
specified by Florida Statute.

The defendant in open court was advised of the right to
appeal from this sentence by filing notice of appeal
within 30 days from this date with the clerk of this

court and the defendant's right to assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends _____.

DONE AND ORDERED in open court at St. Johns County, Florida this Friday, January 19, 2018.

[signature of Judge Maltz]

HOWARD M. MALTZ, Circuit Court Judge

Excerpt of Transcript of December 18, 2017, Trial,

pages 325-329

Q Was it eventually determined there was nothing more that could be done?

A Yes.

Q And did she pass away?

A Yes.

Q When was that?

A That same evening.

Q Okay. Did you pronounce the time of death?

A I did.

Q What time was that?

A That, I don't remember. It was, I think, 11-something that night. Let me find it.

I'm sorry. I just don't have a recollection of the exact time.

I don't see it.

MR. BISHOP: May I approach, Your Honor?

THE COURT: You may.

A Is that record in here?

BY MR. BISHOP:

Q Yes.

A The time of death was 11:18 p.m.

Q Were Ms. Morand's injuries consistent with her having been in a motor vehicle crash?

A Yes.

Q Was the cause of her death and the injuries she suffered the result of that crash?

A Yes.

MR. STONE [defense counsel]: Objection, your Honor.

May we approach?

THE COURT: All right. Let me see
counsel at sidebar.

(The following proceedings were held at the
bench out of the hearing of the jury:)

THE COURT: I guess you'll be doing the
cross?

MR. STONE: I will.

THE COURT: Okay. All right. We're at
sidebar outside the presence of the jury.

Mr. Stone?

MR. STONE: Your Honor, I don't believe
that the witness has the – the State has presented a
proper foundation for the witness to deliver that expert
opinion.

THE COURT: She's a medical doctor,
treating physician.

MR. STONE: She wasn't the treating

physician.

MR. BISHOP: There were multiple treating physicians.

THE COURT: Lay some foundation exactly as to her type of medical expertise and that she was one of the many treating physicians. Once you lay that foundation, I'll overrule the objection, if you can lay that foundation.

Q Were there many physicians that treated her?

A Yes.

Q You, as a hospitalist, treated her. Was there also a surgeon?

A Correct.

Q Was the cause of Ms. Morand's death and the injuries she suffered a result of the motor vehicle crash that she came to the emergency

department for?

MR. STONE: Objection, Your Honor.

Foundation.

THE COURT: Overruled.

A Yes.

MR. BISHOP: No further questions, Your Honor.

THE COURT: Cross-examination, Mr. Stone?

MR. STONE: Thank you, Your Honor.

Excerpt of Transcript of December 18, 2017, Trial,
pages 338-340

Q Okay. Is that – is that – is that something significant?

A That means that – it can be significant, if – I mean, if she needed a study that required iodine, you would have to be careful.

Q Okay. Now, in terms of that, that evening she was admitted. And I think you left at about what time?

A That evening – from the hospital?

Q Yes.

A I – I really don't remember, because every night is different.

Q Okay. But from the moment that she was brought into the hospital to the moment you left, you never laid eyes on her?

A No, I did not.

Q Okay. So you don't know what happened
other than looking at the chart?

A Right. And discussion with the other
physicians involved.

Q Okay. And then the next day when you
came back, you – essentially – well, what you – what
you learned was that she had undergone exploratory
surgery?

A Yes.

Q Okay. And that was by Dr. Adkisson?

A Yes.

Q Okay. And then after – after Dr. Adkisson
completed the exploratory surgery, he basically dressed
everything back up and she was still alive in the
hospital. Correct?

A She was alive. Correct.

Q Okay. Now, in terms of the – actually what was done in the surgery, you don't know specifically the details of the surgery, do you?

A The details are written in the chart. He wrote a nice operative report. So he evacuated a liter of blood. He put in a –

Q Well, I'm talking about what you know specifically.

A Right. I didn't look inside her abdomen, if that's what you're asking.

Q Okay. And, in fact, the surgeon would actually have to be the one to explain exactly what he saw when he – when he performed the surgery?

A Right. But he did that in the note, but, yes.

Q And then the next day when you arrived, you indicated that – well, she was going in for surgery again. Correct?

A Yes, sir.

Q And that – and so you were basically – again, you did not actually lay eyes on Ms. Morand?

A Correct.

Q At some point while you were there, the Code Blue went out. Correct?

A Yes.

Q That was after the second surgery?

A Yes.

Q And was that when there was an effort – an effort made with CPR?

A Yes.

Q All right. And an effort – and she was resuscitated. Correct?

A She – she was resuscitated multiple times, but it was a recurrent event where she could not maintain her blood pressure.

Q Okay. And so there was a discussion about whether – and I think you indicated that in the Code Blue, a Dr. Patou (phonetic) took over. Correct?

A Yes.

Q And who is Dr. Patou?

A She's the surgeon who assisted Dr. Adkisson in the second surgery.

Excerpt of Transcript of December 19, 2017, Trial,
pages 537-547

[Defense Counsel, Mitchell Stone]: Your Honor, in terms of the element of death in this case, which is a – the element of a DUI manslaughter, the State has the requirement to prove beyond a reasonable doubt the cause of death. And that is typically done by calling a medical examiner who would – who actually performed an autopsy. In this case, that wasn't done. In this case the cause of death was testified to by Dr. Patel. Now, Dr. Patel was obviously at the scene – at the hospital when Ms. Morand was admitted. And she testified, essentially, that Ms. Morand was alert, coherent, and had a normal heart rate, and later on went into distress and there was an operation performed. But that during that entire time, although she was at the hospital, she never saw Ms. Morand. She never

treated her. She was not part of the team of surgeons or anyone in the room with her when she – when the surgery was performed. She then went home and the next day she came back.

THE COURT: The doctor, the doctor went home, not Ms. Morand.

MR. STONE: The doctor. I apologize. Dr. Patel went home still having spent the entire day or evening, her entire shift, where Ms. Morand was at the hospital and she was at the hospital, but never saw her. Never went into the room. Has no personal firsthand knowledge of any treatment or anything that – that any doctor or any nurse or anybody else may have had with Ms. Morand. So Dr. Patel went home. And the next day came back for her shift and when she got there, a – the – the doctor – and I'm not recalling the doctor's name. I want to say Atkins.

THE COURT: Adkisson.

MR. STONE: Dr. Adkisson was the doctor who actually performed the surgeries. And then there was also a Dr. Patou who was present. And there was also Dr. Margerum, I believe. And they all had something to do with the treatment. They all had something to do with the – with what happened at the hospital. But Dr. Patel did not, she was a hospitalist, as she testified to. And ultimately, later on, after she had been there for – and I think she had indicated sometime in the afternoon when she arrived, Ms. Morand was going in for surgery number two or was already in for surgery number two. And then after that surgery, she was out again and in a recovery room. And it was much later that a Code Blue went out. And that was the one and only time that Dr. Patel actually laid eyes on Ms. Morand. And – she was not part of the resuscitation

team. I think she indicated that she went – she went there to see if she could assist in any way. She didn't really testify as to anything that she actually did medically for Ms. Morand or in the resuscitation efforts. But she talked about the fact that there was some discussion with the family about – about not going in for a third surgery and the decision was made by Dr. Patou not to do that. The problem here is –

THE COURT: That discussion wasn't with the family. The discussion was amongst the doctors with regards to the third surgery, was my recollection.

MR. STONE: Correct, correct. But there was – I believe she testified that there was some discussion with the family. Somebody – somebody addressed the family.

THE COURT: But not about the third surgery, was my recollection.

MR. STONE: Correct. Correct. It was about the discussion whether they were – and then – the was on – was on those matters.

However, Dr. Patel, that was the one and only time she actually had been in the room with Ms. Morand. I'm not sure exactly what her role was, other than – other than to just be there to assist in case they needed another set of hands. Importantly when she testified, and the State put her on the stand, they handed her the medical records that Ms. – that Dr. Patel relied upon, and that's how she drew her opinions, that's how she drew her testimony from, was essentially what other doctors what other people had done. And so we run into the difficulty of – of her ability to declare a cause of death.

And I'm not saying that in her position, because she signed a death certificate if, in fact, she did, and

that's not in evidence, but let's – for purposes of an argument, let's say that she did sign a death certificate and she did declare Ms. Morand deceased at a particular time on a particular date, that is something probably within her capabilities as a doctor at Baptist South. However, that is not within her expertise, knowledge, education, or anything that we heard about with regard to declaring a cause of death. And I know that this may seem –

THE COURT: What if somebody showed up at the hospital with a gunshot wound to their chest, it went right through their heart, do you think that an emergency room doctor or a hospitalist can say that gunshots is what caused their death? And you don't need the medical examiner to say that.

MR. STONE: Possibility. But I think that under the circumstances it's not a – it's not a matter of

what we think we know, it's a matter of what the State actually can prove, and that is why, typically, medical examiners are called as the – as the – to establish causation. The medical examiner doesn't come into court without the credentialing that is required. A medical examiner obviously has to have certain credentials, certain education, certain experience and certain knowledge in order to make – draw such opinions. Because at the end of the day, that's what the testimony involves. It's an opinion as to a cause of death. It could be disputed by experts. It can be agreed to by experts, but it must be established by legal – by legal authority to do so. Legal authority to do so means that the witness is qualified and has the education, training, and experience, and ability to make the call.

And, in fact, in some cases, this would be – this would fly in the face of the Sixth Amendment right to

confront witnesses that was established in Crawford v. Washington, which is a United States Supreme Court case at 541 U.S. 36 in 2004. Which basically said that the right to confront witnesses applies to testimonial hearsay. Later in Melendez-Diaz versus Massachusetts at 557 U.S. 305, which is a 2009 U.S. Supreme Court case, that – ruled that Crawford ruling was expanded to reports of forensic analysis. And essentially, they determined that forensic analysis reports would, in fact, be testimonial hearsay.

And then later on in Bullcoming versus New Mexico, which, in fact, was a DUI case that made it all the way to the Supreme Court, 131 Supreme Court 2705, which is 2011. In that case, interestingly enough, we have a very similar situation here. And that's a United States Supreme Court case where they reversed the conviction based upon the fact that a

blood alcohol content that was established through a toxicology analysis and resulted in a lab report – and ended up in a lab report. But that was brought in to court to be done for purposes of establishing someone's blood alcohol content.

THE COURT: But doesn't the Florida Rules of Evidence, as well as the Federal Rules of Evidence allow experts to come in and give their opinion based upon hearsay. As long as they don't testify to that hearsay, they can give their opinion based upon hearsay, what they've seen from other experts or what they've seen from – every day it happens with physicians. I've reviewed these records and, in my opinion, this person's back was not caused by this car accident or this person's death was caused from this car accident. It happens probably every week in this courthouse and courthouses all over the state in

personal injury cases. And the Evidence Code is the Evidence Code, whether it's a criminal case or a personal injury case, that allows for expert opinion testimony to be based upon review of medical records.

MR. STONE: I understand, but I think that this goes – this goes into what I'm referring to here. Which is in Bullcoming, essentially that – they had that situation where they brought in a substitute lab analyst, because the lab analyst who had conducted the analysis was not available, so they brought in a substitute lab analyst to testify about the blood alcohol content that was contained in the lab report. And he looked at all the reports of the other lab analysts –

THE COURT: I'm familiar with that case and I'm familiar with the host of cases after that deal with urine drug tests in the context of violations of probation that talk about when the witness can testify

to that hearsay and when they cannot.

But are you familiar or are you aware of any cases anywhere in the United States where an appellate court has said that a medical doctor cannot take the witness stand and opine as to cause of death, even though they're not the ones who did an autopsy or maybe even an autopsy wasn't done?

MR. STONE: Well, and I'm referring to Rosario v. State, which is at 175 So. 3d 843, which is a 2015 Fifth DCA case that dealt with cause of death and with the – with the – ultimately all of these issues. The testimonial hearsay, the failure to call the medical examiner conducting the autopsy.

THE COURT: What did that case say?

MR. STONE: Well, that's what I was reading.

THE COURT: When you're talking about a DUI breath test or blood test, that's testimonial

hearsay.

MR. STONE: If I could have one moment, Your Honor.

THE COURT: Because there are cases out there, that I'm aware of, where the medical examiner who conducted the autopsy, was no longer available. Either they died or the situation – even up in Jacksonville, where you-all are located – where the medical examiner was no longer capable of performing her job, and other medical examiners came in to testify to the cause of death in murder cases, based upon their review of the records.

MR. STONE: What I would say is that the Rosario case stands for the fact that it states that an autopsy report admitted at the defendant's trial for aggravated child abuse and first-degree murder, was testimonial hearsay under the Confrontation Clause,

such that failure to give the defendant the opportunity to cross-examine the medical examiner who prepared the report, violated the defendant's Sixth Amendment right to confront witnesses. Even though the report was not sworn or certified, the report included out-of-court statements made by the examiner and was offered by the State to prove the truth of the matter asserted.

THE COURT: Well, that's markedly different from what we have here. We don't have the State tendering an autopsy report, saying here's the report. We have an expert coming in and giving her opinion as to the cause of death. An expert who happened to be a treating physician to some degree.

MR. STONE: And I would certainly disagree that she was qualified as an expert to declare cause of death.

As indicated –

THE COURT: You didn't object to the opinion during the course of her testimony. I didn't hear anybody object to her rendering the opinion.

MR. STONE: I objected to the foundation of her – of her testimony. Of her – of her being called for that purpose. She wasn't a treating physician. She – she had no hands-on experience with this – with this case, other than to review medical records and ultimately declare the – the death at a certain place in time. But that did not – that does not, then, extend to her credentialing or ability to declare a cause of death. So I would ask that the Court grant a Judgment of Acquittal as to the element of causing death in the DUI manslaughter count.

Thank you.

THE COURT: Okay. Thank you. I appreciate

your arguments, and I understand where you-all are coming from. However, there's been clearly a *prima facie* case of impairment.

So I will deny the Motion for Judgment of Acquittal that Mr. Lockett had argued.

And then I do find that Dr. Patel is qualified to render the opinion that she did with regards to cause of death, so I'll deny the Motion for Judgment of Acquittal.