

APPENDIX

- A) Opinion of Fourth District Court of Appeals
- B) Petition for Writ of Mandamus to 4th DCA
- C) Affirmation of Third District Court of Appeals
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- E) Affirmation of Fourth District Courts of Appeal
- F) Opinion of Attorney General of Florida
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

August 23, 2019

CASE NO.: 4D19-2591

L.T. No.: 502018CA001393XXXMB

JEREMIAH MARION

v. STATE OF FLORIDA

Appellant / Petitioner(s)

Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that the petition for writ of mandamus is dismissed. The petition attempts to relitigate this Court's decision in 4D18-960. Petitioner did not timely seek rehearing in that proceeding. This Court's mandate issued in October 2018. This proceeding is frivolous. Petitioner is cautioned that any further frivolous filing may result in sanctions, such as a bar on pro se filing in this Court or referral to prison officials for disciplinary procedures. See *State v. Spencer*, 751 So. 2d 47 (Fla. 1999); § 944.279(1), Fla. Stat. (2018).

WARNER, GERBER and KLINGENSMITH, JJ., concur.

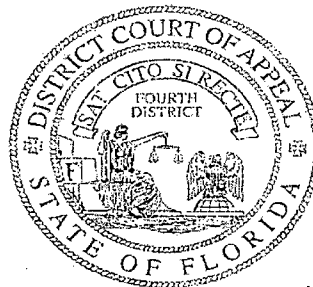
Served:

cc: Attorney General-W.P.B. Jeremiah Marion State Attorney-P.B.
Clerk Palm Beach

ct



LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



Appendix A

IN THE DISTRICT COURT OF APPEALS
FOURTH DISTRICT

8/12/19

JEREMIAH MARION,
Petitioner,

Case No: 4D19-2591
L.T. No: 50-2018-CA-001393-xxxx-MB

V.

STATE OF FLORIDA,
Respondent.

_____ /

PETITION FOR WRIT OF MANDAMUS

Pursuant to Florida Rule of Appellate Procedure 9.100, Jeremiah Marion respectfully petitions this Honorable Court for a Writ of Mandamus compelling the lower tribunal to perform the ministerial duty under civil rule 1.071 and address the merits of the constitutional challenge presented.

I.

BASIS FOR INVOKING JURISDICTION

This court has jurisdiction to issue a Writ of Mandamus under both Article V Section 4(b) (3) Fla. Const. Rule 9.030(b) (3) of Fla. R. App. P. The Supreme Court has held that the Appellate courts may exercise discretion to issue Writs of Mandamus to address pure issues of law relating to the constitutionality of statutes. See: Through Hess v. Metro Dade County, 467 So.2d 237 (Fla. 1985).

Appendix B

Pertinent here is that a Writ of Mandamus is also an appropriate remedy to test the correctness of an order determining that a court lacks jurisdiction. For if the dismissal of the civil complaint was in error the court has both the jurisdiction and the ministerial duty to hear the case and resolve the complaint on its merits. See *Griffin v. Sistuenk*, 816 So.2d 600 (Fla. 2002); *Lombardo v. Haige*, 971 So.2d 1037 (Fla. 2nd DCA 2008).

This argument is grounded in Article 1, Sect. 21, of Fla. Constitutions mandate that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. A mandamus from this court is to enforce a clear legal right and breach of an indisputable legal duty. See: Civil Procedure Rule 1.071 and *Pleus v. Crist*, 14 So.3d 941 (Fla. 2009).

II. **STATEMENT OF THE FACTS**

On February 6, 2018 Jeremiah Marion filed a civil procedure Rule 1.071 challenge to the facial constitutionality of Florida Sexual Battery Statue 794.011, because of the evidentiary provisions of section 794.022. See: 15th cir Case No. 50-2018-CA-001393-XXXX-MB.

On March 1, 2018 circuit Judge James Nutt dismissed the suit after determining it was only cognizable in a rule 3.850 Habeas Corpus procedure. A determination appealed to this court in case 4018-960.

On May 30, 2018, the Florida Attorney General filed a brief arguing to this court that because a constitutional challenge to a statute of conviction could be presented at any time under Rule 3.850 the lower court's ruling should be affirmed. This court agreed with the Attorney General and ruled accordingly on October 4, 2018 with a P.C. Affirmance.

Based upon this court's ruling Jeremiah Marion filed a constitutional challenge to his statute of conviction under Rule 3.850 in the court of conviction on December 1, 2018.

On January 29, 2019 the 16th circuit dismissed the filing with the determination it could not be filed at any time

On February 4, 2019 Jeremiah appealed the court's ruling to the third D.C.A. pointing out conflict with this court. However, on July 24, 2019 the appellate court entered a P.C. Affirmance that the Rule 3.850 motion was procedurally barred. See: 3rd D.C.A. Case No: 3D19-1087.

Based upon the 16th circuit ruling and the 3rd D.C.A. affirmance Jeremiah Marion returns to this court for a jurisdictional resolution through a Writ of Mandamus.

III.

NATURE OF RELIEF

The nature of relief sought by this petition is a Writ of Mandamus compelling 15th Judicial Circuit Judge James Nutt to either reopen Case No: 50-2018-CA-001393-xxxx-MB, or assign a new case number, and perform the ministerial duty under Civil Rule 1.071 to address the merits of the constitutional challenge presented.

IV.

ARGUMENT

To understand the logical path leading to the premise argued here requires a brief historic review of sexual conduct legislation in this country. Back before reality television made bad behavior fashionable and allegations of criminal sexual assault became common.

In 1955 The American Law Institute promulgated The Model Penal Code and made clear that it did not recommend or provide for criminal penalties for consensual sexual relations conducted in private. See: A.L.T., Model Penal Code, comments pg. 372 (1980). It justifies its decision on three grounds; number 3 that ... “The laws were arbitrarily enforced and this invited the danger of blackmail.” See: Comments at 277-28(Tent draft Nov. 4, 1955).

The text of Florida sexual battery statute defines sexual conduct as “the oral, anal or vaginal penetration of, or union with, the sexual organ of another, or the

anal or vaginal penetration of another by any other object.” This statute criminalizes sexual foreplay. Anyone who believes they can tell when a woman wants to be kissed is delusional. It is common for prosecutors to argue to juries that even if the tip of a finger enters the vaginal cavity it constitutes a sexual battery. They then close in cases prosecuted under the evidentiary provisions of 794.022 by stating the law in Florida allows a conviction based solely on the testimony of the victim. Encouraging jurors to base their verdict on perceived testimonial credibility and set aside any exculpatory evidence presented. Thus sexual foreplay becomes a tool for a clever blackmail forcing Florida citizens to prophylactically obtain “pre-copulation” agreements between dating parties because 794.022 states: “The testimony of the victim need not be corroborated in a prosecution under 794.011.” It is time to re-evaluate the necessity of this overbroad evidentiary provision and the due process of law abridgments resulting from its use.

The Florida legislature exercised the authority vested in them by the people to codify the constitutional mandates of Article 1, Section 9, due process of law and Section 21, access to the courts by crafting civil procedure Rule 1.071. This law specifically empowers a person to challenge the constitutional validity of state laws. Jeremiah Marion utilized this rule as a person not as a convicted prisoner. He has an express right as a person to access the court with his challenge and the court the obligation to administer process.

The evidentiary provisions of Florida sexual battery law compromises the fundamental liberty safeguards of due process by exposing the innocent to the extortionary exploitations of unscrupulous liars. Accusations of sexual misconduct have become so prevalent that victims no longer need the overbroad protections of this law to encourage them to report this crime. Had Mrs. Ford accused Justice Brett Kavanaugh in Florida he would've been fighting for his freedom rather than a seat on the U.S. Supreme Court. This overbroad legislation is no longer necessary and ripe for constitutional based analysis.

In 2003 the U.S. Supreme Court struck down the Virginia Cross burning statute. They held that the evidentiary provision that any cross burning was sufficient to prove intent to intimidate was an unconstitutional skew towards convictions. See: *Virginia v. Black*, 538 U.S. 343 (2003).

In 2015 the Florida Supreme Court held that when the trial judge includes the text of section 794.022 in his jury instruction on the law of the case the jury is improperly skewed towards a conviction. See: *Gutierrez v. State*, 177 So.3d 226 (Fla. 2015).

Jeremiah Marion believes that if the law requires that a trial judge charge the jury on the law of the case, and the Supreme Court determines part of that law violates due process then the law no longer comports with contemporary due process parameters.

In 2005 the U.S. Supreme Court ruled that as long as a prisoner is not seeking immediate or speedier release from prison a civil suit is an appropriate means of challenging a law. See: *Wilkinson v. Dodson*, 125 S.Ct. 1242 (2005). In his civil suit Jeremiah Marion sought a declaration on the validity of statute 794.011 under the evidentiary provisions of 794.022. A successful resolution would not result in his release from prison.

REASON FOR GRANTING THE WRIT

The 15th circuit judge incorrectly determined the rule 1.071 filings subject matter was only cognizable under a rule 3.850 motion filed in the court of conviction. This Court agreed. The 16th Circuit Court of conviction disagreed. The Third D.C.A. affirmed their ruling. The only method left to resolve this jurisdictional issue abridging Mr. Marion's right of access to the court, the administration of justice, and due process of law, is a writ of mandamus.

Therefore, since Jeremiah Marion has exhausted all other legal and administrative remedies, a petition for a writ of mandamus is the next appropriate step. See: *Finfrock v. Fla. Civil Commitment Center*, 34 So.3d 777 (Fla. 2nd DCA 2010); *King v. State*, 665 So.2d 377 (fla.4 DCA 1996).

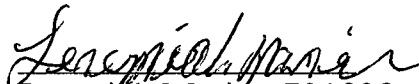
CONCLUSION

In this case a circuit court incorrectly dismissed a matter it was constitutionally duty bound to hear and resolve as a ministerial function: i.e. administer justice. Therefore, this court should issue a writ of mandamus to correct the error. The writ should direct the 15th circuit to revisit the case and rule on the merits of the arguments presented, or any other relief this court deems appropriate.


Jeremiah Marion 731838

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this petition was furnished by mail pre-paid, to the office of the Attorney General, 1515 North Flager Dr. #900, W.P.B. Fl. 33401-3432 this 12 day of August 2019.


Jeremiah Marion 731838
South Bay Corr. & Rehab. Facility
P.O. Box 7171
South Bay, Fl. 33493

Third District Court of Appeal

State of Florida

Opinion filed July 24, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1087
Lower Tribunal No. 94-101-M

Jeremiah Marion,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Monroe County, Ruth L. Becker, Judge.

Jeremiah Marion, in proper person.

Ashley Moody, Attorney General, for appellee.

Before EMAS, C.J., and FERNANDEZ, and MILLER, JJ.

PER CURIAM.

Affirmed.

Appendix "C"

**IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v.

Case Number: 94-CF-101-M

JEREMIAH MARION,
Defendant.

**ORDER DENYING MOTION FOR POSTCONVICTION RELIEF PURSUANT TO FLORIDA
RULE OF CRIMINAL PROCEDURE 3.850**

THIS CAUSE having come before the Court upon the Defendant's, pro se, Motion for Postconviction Relief filed pursuant to Fla. R. Crim. P. 3.850 (the "Motion"), and the Court, having considered the Motion, the Court file, pertinent legal authority, and being otherwise fully advised in the premises finds and orders as follows:

After a trial by jury, the Defendant was convicted of one count of sexual battery under § 794.011 Fla. Stat., as well as two counts of robbery, and one count of aggravated battery. On February 9, 1995, the Defendant was sentenced to life in prison on the sexual battery count, and to thirty (30) years in prison on the remaining counts to run concurrently. The Defendant's convictions and sentences were affirmed on direct appeal. *Marion v. State*, 674 So. 2d 878 (Fla. 3d DCA 1996). The Defendant previously filed two motions for postconviction relief, both of which were denied.

In this Motion, the Defendant argues that his judgment and sentence must be vacated since § 794.022(1) Fla. Stat. is unconstitutional because it states that the testimony of the victim need not be corroborated in a prosecution for sexual battery under § 794.011 Fla. Stat.

Exhibit "D"
Appendix 1 "D"

The Defendant's Motion must be dismissed since it is untimely pursuant to Fla. R. Crim.

P. 3.850(b) which states as follows:

(b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final unless it alleges that

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, and the claim is made within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence, or

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, and the claim is made within 2 years of the date of the mandate of the decision announcing the retroactivity, or

(3) the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion. A claim based on this exception shall not be filed more than 2 years after the expiration of the time for filing a motion for postconviction relief.

Here, the Defendant's judgment and sentence became final when his direct appeal was denied, and the Mandate issued in 1996. Therefore, the two-year deadline to file motions for postconviction relief has expired, and his claim must be dismissed as untimely.

Even if the Defendant's claim had been timely filed, it would be denied because it lacks merit. § 794.022(1) Fla. Stat. provides, "[t]he testimony of the victim need not be corroborated in a prosecution under s. 794.011." § 794.011 is the sexual battery statute. The Defendant argues that this provision is unconstitutional because it strips away the State's burden to prove its case beyond a reasonable doubt and "exposes society to extortion by unscrupulous liars." (the Motion at 11). This is simply not the case. The legislative history "reveals that the statute was directed at the appellate review of the sufficiency of the evidence in sexual battery cases. This consideration is entirely separate from the question of whether a jury should accept the uncorroborated testimony of the victim in the trial of a sexual battery prosecution." *Brown v.*

State, 11 So. 3d 428, 439 (Fla. 2d DCA 2009). This is not a unique scenario; many crimes must be proven based on victim testimony alone without corroborating witnesses or physical evidence. In a prosecution for sexual battery, the State still has the burden to prove its case beyond a reasonable doubt, and the trier of fact must still weigh credibility when deciding whether or not to accept uncorroborated testimony of the victim.

Therefore, for the foregoing reasons, the Defendant's Motion for Postconviction relief is hereby **DENIED**.

The Defendant shall have **thirty (30) days** from the date of this order in which to appeal.

DONE AND ORDERED this 29 day of January 2019, in Marathon, Monroe County, Florida.


Honorable Ruth Becker
Acting Circuit Court Judge

Copies to:

Jeremiah Marion
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South Bay Correctional Facility
P.O. Box 7171
South Bay, FL 33493

Office of the State Attorney

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JEREMIAH MARION,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D18-960

[October 4, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; James Nutt, Judge; L.T. Case No. 2018CA001393-AO.

Jeremiah Marion, South Bay, pro se.

Pamela Jo Bondi, Attorney General, Tallahassee, and Kimberly T. Acuña, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

MAY and FORST, JJ., and HILAL, JENNIFER, Associate Judge, concur.

* * *

Not final until disposition of timely filed motion for rehearing.

Exhibit "I"

Appendix E

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

CASE NO. 4D18-960

JEREMIAH MARION,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION

ANSWER BRIEF OF APPELLEE

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Exhibit [] "F"
Appendix

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<u>Zuluaga v. State, Dept. of Corrections</u> , 32 So. 3d 674 (Fla. 1st DCA 2010)	4

Statutes and other authorities:

§ 794.011, Fla. Stat.	1, 2
Fla. R. Crim. P. 3.850.	1, 3

PRELIMINARY STATEMENT

In proceedings below, Appellant was the Plaintiff and Appellee was the Defendant/Respondent in the Civil Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

In this brief, the following symbols will be used:

“R” to denote the record on appeal; and

“IB” to denote the Appellant’s Initial Brief.

All emphasis in this brief is supplied by Appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On or about February 21, 1995, in Case Number MR-94-101-CF, after a jury trial, Appellant was convicted of sexual battery under § 794.011, Fla. Stat., and other offenses, in Monroe County, Florida (R 5, 28). Appellant was sentenced to life in prison and is currently incarcerated at South Bay Correctional Facility, South Bay, Florida (R 4, 5).

On February 1, 2018, in the civil circuit court of the Fifteenth Judicial Circuit, Appellant filed a “Civil Rights Complaint Pursuant to Fla. R. Civ. P. 1.071” challenging the constitutionality of § 794.011, Fla. Stat. (R 4-20).

By order dated March 1, 2018, the trial court entered an Order Dismissing Civil Rights Complaint and Directing the Clerk to Close the File (R 41-42). The lower court found that Appellant’s claim was cognizable in a Fla. R. Crim. P. 3.850 (“Rule 3.850”) motion, which is the proper method to claim that a judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida (R 41). The trial court dismissed the complaint because a motion for postconviction relief under Rule 3.850 must be filed in the court in which Appellant was sentenced, citing Rafael v. Crews, 154 So. 3d 505, 507 (Fla. 4th DCA 2015) (R 41). This appeal follows.

SUMMARY OF THE ARGUMENT

Appellant sought by way of a “Civil Rights Complaint” filed in Palm Beach County to challenge the constitutionality of § 794.011, Fla. Stat., the statute underlying his criminal conviction arising out of Monroe County. The Palm Beach County Circuit Court properly dismissed the “complaint” because Appellant’s postconviction claim could not be entertained by the Palm Beach County Circuit Court but must be filed in the circuit court which entered the judgment and sentence – Monroe County. See Rafael v. Crews, 154 So. 3d 505, 506–07 (Fla. 4th DCA 2015) (“If appellant is entitled to any relief under rule 3.850 of the Florida Rules of Criminal Procedure, the motion for relief must be filed in the court of the county where appellant was sentenced.”).

ARGUMENT

THE PALM BEACH COUNTY CIRCUIT COURT PROPERLY DISMISSED APPELLANT'S COMPLAINT.

A. Applicable law.

A challenge to the constitutionality of a statute underlying a criminal conviction can be raised in a Fla. R. Crim. P. 3.850 motion. Rule 3.850 states in pertinent part:

a) Grounds for Motion. The following grounds may be claims for relief from judgment or release from custody by a person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida:

(1) The judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida.

See also Bell v. State, 585 So. 2d 1125, 1126-27 (Fla. 2d DCA 1991) (application of a facially unconstitutional statute may be raised at any time, including in a motion for postconviction relief.)

If a defendant is entitled to any relief under Rule 3.850, the motion for relief must be filed in the court of the county where the defendant was sentenced. Rafael v. Crews, 154 So. 3d 505, 506-07 (Fla. 4th DCA 2015).

B. Discussion.

Appellant's civil "complaint" challenged the constitutionality of the statute underlying his criminal conviction. As noted above, such a claim is properly raised

in a Rule 3.850 motion for postconviction relief.

Generally, “[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.” Zuluaga v. State, Dept. of Corr., 32 So. 3d 674, 677 (Fla. 1st DCA 2010), citing Fla. R. App. P. 9.040(c). However, the lower court (Palm Beach County Circuit Court) could not consider the “complaint” as a motion for postconviction relief because such a motion must be filed in the circuit court which entered the judgment and sentence (Monroe County Circuit Court). See Rafael, supra. See also Zuluaga, 32 So. 3d at 677 (circuit court has no jurisdiction to review the legality of a conviction in another circuit).

CONCLUSION

Based on the foregoing arguments and authorities, it is respectfully submitted that this Court affirm the trial court’s dismissal of Appellant’s complaint.

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

/s/ Kimberly T. Acuña
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Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. mail to Jeremiah Marion, DOC# 791838, South Bay Correctional Facility, P.O. Box 7171, South Bay, Florida 33493 on May 30, 2018.

/s/ Kimberly T. Acuña
KIMBERLY T. ACUÑA
Assistant Attorney General

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

JEREMIAH MARION,
Plaintiff,

CASE NO.: 2018CA001393
CIVIL DIVISION: AO

v.

STATE OF FLORIDA,
Defendant.

**ORDER DISMISSING CIVIL RIGHTS COMPLAINT
AND DIRECTING THE CLERK TO CLOSE THE FILE**

THIS MATTER came before the Court on Plaintiff's Civil Rights Complaint Pursuant to Fla. R. Civ. P. 1.071 ("Complaint") filed on February 6, 2018. The Court has carefully considered the Complaint, all relevant portions of the case file, and is otherwise fully advised in the premises.

Pursuant to section 57.085(6), Fla. Stat., upon an adjudication of indigency, but before a prisoner may initiate a judicial proceeding, the Court must review the prisoner's claim and determine whether it is legally sufficient to state a cause of action for which the Court has jurisdiction and may grant relief.

Plaintiff alleges that he "sentenced to life per F.S. 794.011" in Monroe County, Florida. Plaintiff claims in the Complaint that section 794.011, Florida Statutes is unconstitutional.

Plaintiff's argument is not cognizable in a "Civil Rights Complaint," but is instead cognizable as a motion for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. See Fla. R. Crim. P. 3.850(a)(1) (stating that a post conviction motion is proper method to claim a judgment was entered or sentence imposed in violation of the Constitution or laws of the United States or the State of Florida). A post conviction motion under Rule 3.850 must be filed in the court in which the defendant was sentenced. *Rafael v. Crews*, 154 So. 3d 505, 507 (Fla.

Appendix G

4th DCA 2015). The Court finds that Plaintiff seeks relief that can only be granted by the sentencing court. Accordingly, it is hereby,

ORDERED that Petitioner's Civil Rights Complaint Pursuant to Fla. R. Civ. P. 1.071 is **DISMISSED**. The Clerk is further directed to close this file.

DONE AND SIGNED in Chambers at West Palm Beach, Palm Beach County, Florida,
this 1st day of March, 2018.



JAMES NUTT
Circuit Judge

COPIES FURNISHED:

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