Appendix A

U.S. Court of Appeals Judgments

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 20-11386

District Court Docket No.
0:20-cv-60163-RKA

CHARLENE WALKER ROSA,

Plaintiff - Appellant,

versus

MICHAEL J. SATZ,
BROWARD COUNTY STATE ATTORNEY,

Defendants - Appellees.

Appeal from the United States District Court for the
Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: January 08, 2021
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna H. Clark

ISSUED AS MANDATE 03/11/2021

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10627-A

CHARLENE TERRY-ANN WALKER ROSA,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

No. 20-11276-AA

CHARLENE TERRY-ANN WALKER ROSA,
a.k.a. Charlene Rosa,

Petitioner-Appellant,

versus

HOWARD FINKELSTEIN,
DOHN WILLIAMS, JR.,

Respondents-Appellees.

No. 20-11386-CC

CHARLENE WALKER ROSA,

Plaintiff-Appellant,

versus

Appendix A

MICHAEL J. SATZ,
BROWARD COUNTY STATE ATTORNEY,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

ORDER:

Appellant's motions to consolidate Case Nos. 20-10627, 20-11276, and 20-11386 are DENIED.

/s/ Robert J. Luck
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 11, 2021

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 20-11386-CC
Case Style: Charlene Walker Rosa v. Michael Satz, et al
District Court Docket No: 0:20-cv-60163-RKA

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being forwarded to counsel and pro se parties. A copy of the court's decision was previously forwarded to counsel and pro se parties on the date it was issued.

The enclosed copy of the judgment is hereby issued as mandate of the court. The court's opinion was previously provided on the date of issuance.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lois Tunstall
Phone #: (404) 335-6191

Enclosure(s)

MDT-1 Letter Issuing Mandate

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 10, 2020

Charlene Terry-Ann Walker Rosa
Florida Women Reception Center - Inmate Legal Mail
3700 NW 111TH PL
OCALA, FL 34482-1479

Appeal Number: 20-11386-CC; 20-10627-A; 20-11276 -AA
Case Style: Charlene Walker Rosa v. Michael Satz, et al
District Court Docket No: 0:20-cv-60163-RKA

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov.

The enclosed order has been ENTERED.

Appellee's brief is due 30 days from the date of the enclosed order Only in case no.

20-11386-CC.

Appellant's brief is due 40 days from the date of the enclosed order Only in case no.

20-11276-AA.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Carol R. Lewis, CC
Phone #: (404) 335-6179

MOT-2 Notice of Court Action

Appendix A

Appendix B

Distinct count orders

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-60163-CV-ALTMAN/Reid

CHARLENE WALKER ROSA,

Plaintiff,

v.

MICHAEL J. SATZ,
et al.,
Defendant(s).

_____/

ORDER

THIS MATTER came before the Court on *pro se* Plaintiff Charlene Walker Rosa's Motion to Proceed *in Forma Pauperis* on Appeal [ECF No. 29], filed on April 30, 2020. Courts may authorize a party to proceed *in forma pauperis* in any suit so long as the party complies with the prescriptions of 28 U.S.C. section 1915(a)(1). Because the Plaintiff has complied with the statutory requirements, it is hereby

ORDERED AND ADJUDGED that the Plaintiff's Motion to Proceed *in Forma Pauperis* on Appeal [ECF No. 29] is **GRANTED** as follows:

1. The Plaintiff is permitted to proceed *in forma pauperis* on appeal. This means that she need not *prepay* even a partial filing fee or costs for service of process.
2. But the Plaintiff shall owe the United States a debt of $505.00, which must be paid to the Clerk of the Court as funds become available.

Appendix B

3. The jail/prison having custody of the Plaintiff must make payments from the Plaintiff's account to the Clerk of this Court each time the amount in the account exceeds $10.00 until the full filing fee of $505.00 is paid.

DONE AND ORDERED at Fort Lauderdale, Florida, on this 13th day of May 2020.

ROY K. ALTMAN
UNITED STATES DISTRICT JUDGE

cc:

Charlene Walker Rosa
L06814
Florida Women's Reception Center
3700 NW 111th Place
Ocala, FL 34482-1479
PRO SE

Florida Department of Corrections
Inmate Trust Fund
Attn: Veronica Wold
Centerville Station
P. O. Box 12100
Tallahassee, FL 32317

Financial Department,
United States District Court, Southern District of Florida

Subject:Activity in Case 0:20-cv-60163-RKA Rosa v. Satz et al Order on Motion for Leave to Proceed in forma pauperis
This is an automatic e-mail message generated by the CM/ECF system.
Please DO NOT RESPOND to this e-mail because the mail box is unattended.
NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court
Southern District of Florida

Notice of Electronic Filing
The following transaction was entered on 1/30/2020 11:03 AM EST and filed on 1/30/2020

Case Name: Rosa v. Satz et al

Case Number: 0:20-cv-60163-RKA

Filer:

Document Number: 5

Docket Text:
ORDER granting [3] Motion for Leave to Proceed in forma pauperis. Plaintiff to Proceed without Prepayment of Filing Fee but Establishing Debt to Clerk of $350.00. Granting to the extent that the plaintiff need not prepay even a partial filing fee in this case, or to prepay costs such as for service of process. USM Service NOT Ordered. Signed by Magistrate Judge Lisette M. Reid on 1/30/2020. <I>See attached document for full details.</I> (fbn)

0:20-cv-60163-RKA Notice has been electronically mailed to:

0:20-cv-60163-RKA Notice has not been delivered electronically to those listed below and will be provided by other means. For further assistance, please contact our Help Desk at 1-888-318-2260.:
Charlene Walker Rosa
L06814
Florida Women%27s Reception Center
3700 NW 111th Place
Ocala, FL 34482-1479

Service list page 1 only

Appendix B

U.S. District Court - Southern District of Florida

Exhibit 8J

Charlene Walker Rosa L06814
Florida Women%27s Reception Center
3700 NW 111th Place
Ocala, FL 34482-1479

Case: 0:20-cv-60163-RKA #5 6 pages Thu Jan 30 11:21:35 2020

IMPORTANT: REDACTION REQUIREMENTS AND PRIVACY POLICY

Note: This is NOT a request for information.

Do NOT include personal identifiers in documents filed with the Court, unless specifically permitted by the rules or Court Order. If you MUST include personal identifiers, ONLY include the limited information noted below:

- Social Security number: last four digits only
- Taxpayer ID number: last four digits only
- Financial Account Numbers: last four digits only
- Date of Birth: year only
- Minor's name: initials only
- Home Address: city and state only (for criminal cases only).

Attorneys and parties are responsible for redacting (removing) personal identifiers from filings. The Clerk's Office does not check filings for personal information. Any personal information included in filings will be accessible to the public over the internet via PACER.

For additional information, refer to Fed. R. Civ. P. 5.2 and Fed. R. Crim. P. 49.1. Also see the CM/ECF Administrative Procedures located on the Court's website www.flsd.uscourts.gov.

IMPORTANT: REQUIREMENT TO MAINTAIN CURRENT MAILING ADDRESS AND CONTACT INFORMATION

Pursuant to Administrative Order 2005-38, parties appearing pro se and counsel appearing pro hac vice must file, in each pending case, a notice of change of mailing address or contact information whenever such a change occurs. If court notices sent via the U.S. mail are returned as undeliverable TWICE in a case, notices will no longer be sent to that party until a current mailing address is provided.

IMPORTANT: ADDITIONAL TIME TO RESPOND FOR NON-ELECTRONIC SERVICE

Additional days to respond may be available to parties serviced by non-electronic means. See Fed.R.Civ.P.6(d), Fed.R.Crim.P.45(c) and Local Rule 7.1(c)(1)(A). Parties are advised that the response deadlines automatically calculated in CMECF do NOT account for and may NOT be accurate when service is by mail. Parties may NOT rely on response times calculated in CMECF, which are only a general guide, and must calculate response deadlines themselves.

See reverse side

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-60163-CV-ALTMAN
MAGISTRATE JUDGE REID

CHARLENE WALKER ROSA,

Plaintiff,

v.

MICHAEL J. SATZ, et al.,

Defendant(s).
_____/

ORDER OF INSTRUCTIONS TO *PRO SE* CIVIL RIGHTS LITIGANTS

Plaintiff in this case is proceeding *pro se*. It is therefore important that she be advised of essential requirements concerning this case. It is therefore

ORDERED AND ADJUDGED as follows:

1. It is the responsibility of Plaintiff to keep the Court advised of her current address at all times. If Plaintiff's address changes and no change of address is promptly filed with the Clerk of Court, this case may be dismissed for lack of prosecution. A change of address must be labeled "Notice of Change of Address" and must not include any motions or other information except for the new address and the effective date of the change. Plaintiff must understand that the Court does not know if Plaintiff is transferred or released unless a change of address is filed.

Appendix B

2. It is Plaintiff's responsibility to provide the full name, title, if any, and address of the defendant(s). If service cannot be accomplished upon a defendant due to lack of information provided by Plaintiff, the case will be dismissed as to that defendant(s). If there is only one defendant and service cannot be achieved, the entire case will be dismissed.

3. Plaintiff is instructed that the Court has no legal authority to appoint counsel for the Plaintiff in a civil rights suit. In extraordinary cases, it can request a lawyer to represent the plaintiff, but such cases are rare, and no appointment can be made in any civil rights case.

4. Plaintiff shall serve upon the defendant(s) and the defendant(s) upon Plaintiff, or, if appearance by counsel has been entered, upon their respective counsel, copies of all further pleadings or other documents submitted for consideration by the Court. This means that before counsel has appeared for the defendant(s), Plaintiff shall send to the defendant(s) personally a copy of every further pleading, motion, or other paper submitted to the Court. After counsel has appeared for the defendant(s), the copy shall be sent directly to counsel for the defendant(s), rather than to the defendant(s) personally. Plaintiff shall include with each pleading, motion, or other paper submitted to be filed a certificate stating the date that an accurate copy of the pleading, motion, or other paper was mailed to defendant(s) or counsel for defendant(s). If any pleading, motion, or other paper

submitted to the Court does not include a certificate of service upon the defendant(s) or counsel for the defendant(s), it will be stricken by the Court.

5. In cases where Plaintiff is filing an Amended complaint, Plaintiff shall not send a copy of the amended complaint to the defendants. In such cases, a copy of the amended complaint and a motion for leave to amend the complaint shall be filed with the court only and not mailed to any of the defendants.

6. All pleadings must include the case number at the top of the first page. The parties shall send the original of every pleading or document to the Clerk of this Court. Miami cases to be filed at 400 North Miami Avenue, 8th Floor, Miami, Florida 33128; Broward cases to be filed at 299 East Broward Boulevard, Room 108, Fort Lauderdale, Florida 33301; West Palm Beach cases to be filed at 701 Clematis Street, Room 202, West Palm Beach, Florida 33401. Each submission shall include 1) a copy of the pleading or document, and 2) a certificate of service stating the date a true copy of the pleading or document was sent to the opposing party(ies) and/or counsel for such party(ies).

7. No original pleading or document shall be sent directly to a Judge or Magistrate of this Court. Any paper submitted directly to a Judge or Magistrate rather than to the Clerk will be disregarded by the Court.

8. Plaintiff is instructed not to send letters to the Court or to the Clerk. All documents must be filed in accordance with the Federal Rules of Civil Procedure

Appendix B

and copies must be furnished to opposing counsel. No letter to the Court will be answered. Plaintiff must understand that letters are not motions or pleadings and are therefore not docketed in the case.

9. A *pro se* litigant and his or her family, friends or acquaintances must not call any Judge's office for any reason. No information about the case can be obtained from the Judge's office. Brief case status information contained on the docket sheet may be available from the Clerk of Court, but no Court employee can provide legal advice to any litigant, *pro se* or otherwise.

10. Plaintiff has no counsel to assist in the discovery process. Attention is therefore drawn to Fed. R. Civ. P. 26(a), which lists the various forms of discovery available in civil cases. Plaintiff is instructed that the Court will not grant any motion by a *pro se* plaintiff to take depositions, but will otherwise permit reasonable, relevant discovery by the methods described in the Federal Rules of Civil Procedure.

11. It is Plaintiff's responsibility to actively pursue this case, obtain any essential discovery, file all necessary pleadings and motions and otherwise comply with all scheduling orders and prepare the case for trial. Failure to do this will probably result in dismissal of the case for lack of prosecution.

12. If Plaintiff has been permitted to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), she must understand that a § 1915(a) order only permits a plaintiff to proceed without prepayment of costs and fees; it does not mean that

Plaintiff is not obligated under the law to pay the costs and fees when he or she is able to do so. It is Plaintiff's responsibility to make monthly payments of 20% of the preceding month's income credited to his or her account, and the agency having custody of Plaintiff must forward payments from Plaintiff's account to the Clerk each time the amount in the account exceeds $10.00 until the full filing fee is paid.

At the conclusion of the case, the Court may tax costs against the losing party or parties, and if Plaintiff wins the case such an order will probably eliminate any debt for costs such as service of process by the Marshal. Otherwise, any costs and fees incurred by the Marshal on Plaintiff's behalf are properly billed to Plaintiff.

DONE AND ORDERED at Miami, Florida, on this 28th day of January 2020.

s/Lisette M. Reid
UNITED STATES MAGISTRATE JUDGE

cc:

Charlene Walker Rosa
L06814
Florida Women's Reception Center
3700 NW 111th Place
Ocala, FL 34482-1479
PRO SE

Appendix B

Subject:Activity in Case 0:20-cv-60163-RKA Rosa v. Satz et al Order on Motion for Leave to Appeal in forma pauperis
This is an automatic e-mail message generated by the CM/ECF system.
Please DO NOT RESPOND to this e-mail because the mail box is unattended.
NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court
Southern District of Florida

Notice of Electronic Filing
The following transaction was entered on 5/14/2020 8:33 AM EDT and filed on 5/14/2020

Case Name: Rosa v. Satz et al

Case Number: 0:20-cv-60163-RKA

Filer:

WARNING: CASE CLOSED on 03/24/2020

Document Number: 30

Docket Text:
ORDER granting but Plaintiff shall owe the United States a debt of $505.00 re [29] Motion for Leave to Appeal in forma pauperis. Signed by Judge Roy K. Altman on 5/13/2020. <I>See attached document for full details.</I> (apz)

0:20-cv-60163-RKA Notice has been electronically mailed to:

0:20-cv-60163-RKA Notice has not been delivered electronically to those listed below and will be provided by other means. For further assistance, please contact our Help Desk at 1-888-318-2260.:
Charlene Walker Rosa
L06814
Florida Womens Reception Center
3700 NW 111th Place
Ocala, FL 34482-1479

Service list page 1 only

Appendix B

U.S. District Court - Southern District of Florida

Charlene Walker Rosa L06814
Florida Womens Reception Center
3700 NW 111th Place
Ocala, FL 34482-1479

Case: 0:20-cv-60163-RKA #30 4 pages Thu May 14 8:51:28 2020

IMPORTANT: REDACTION REQUIREMENTS AND PRIVACY POLICY

Note: This is NOT a request for information.

Do NOT include personal identifiers in documents filed with the Court, unless specifically permitted by the rules or Court Order. If you MUST include personal identifiers, ONLY include the limited information noted below:

- Social Security number: last four digits only
- Taxpayer ID number: last four digits only
- Financial Account Numbers: last four digits only
- Date of Birth: year only
- Minor's name: initials only
- Home Address: city and state only (for criminal cases only).

Attorneys and parties are responsible for redacting (removing) personal identifiers from filings. The Clerk's Office does not check filings for personal information. Any personal information included in filings will be accessible to the public over the internet via PACER.

For additional information, refer to Fed. R. Civ. P. 5.2 and Fed. R. Crim. P. 49.1. Also see the CM/ECF Administrative Procedures located on the Court's website www.flsd.uscourts.gov.

IMPORTANT: REQUIREMENT TO MAINTAIN CURRENT MAILING ADDRESS AND CONTACT INFORMATION

Pursuant to Administrative Order 2005-38, parties appearing pro se and counsel appearing pro hac vice must file, in each pending case, a notice of change of mailing address or contact information whenever such a change occurs. If court notices sent via the U.S. mail are returned as undeliverable TWICE in a case, notices will no longer be sent to that party until a current mailing address is provided.

IMPORTANT: ADDITIONAL TIME TO RESPOND FOR NON-ELECTRONIC SERVICE

Additional days to respond may be available to parties serviced by non-electronic means. See Fed.R.Civ.P.6(d), Fed.R.Crim.P.45(c) and Local Rule 7.1(c)(1)(A). Parties are advised that the response deadlines automatically calculated in CMECF do NOT account for and may NOT be accurate when service is by mail. Parties may NOT rely on response times calculated in CMECF, which are only a general guide, and must calculate response deadlines themselves.

See reverse side

Court Name: SOUTHERN DISTRICT OF FLORIDA
Division: 1
Receipt Number: FLS100216219
Cashier ID: jcaceres
Transaction Date: 10/02/2020
Payer Name: FLORIDA DEPT OF CORRECTIONS

PLRA CIVIL FILING FEE
For: CHARLENE WALKER ROSA
Case/Party: D-FLS-0-20-CV-060163-001
Amount: $22.00

PAPER CHECK CONVERSION
Check/Money Order Num: 0700719
Amt Tendered: $22.00

Total Due: $22.00
Total Tendered: $22.00
Change Amt: $0.00

Returned check fee $53

Checks and drafts are accepted subject to collection and full credit will only be given when the check or draft has been accepted by the financial institution on which it was drawn.

Appendix B

Subject:Activity in Case 0:20-cv-60163-RKA Rosa v. Satz et al Clerks Receipt
This is an automatic e-mail message generated by the CM/ECF system.
Please DO NOT RESPOND to this e-mail because the mail box is unattended.
NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court
Southern District of Florida

Notice of Electronic Filing
The following transaction was entered on 11/16/2020 1:30 PM EST and filed on 11/16/2020

Case Name: Rosa v. Satz et al

Case Number: 0:20-cv-60163-RKA

Filer:

WARNING: CASE CLOSED on 03/24/2020

Document Number: 33

Docket Text:
Clerks Notice of Receipt of Appeal Partial Filing Fee received on 10/2/2020 in the amount of $ 22.00, receipt number FLS100216219. (jcs)

0:20-cv-60163-RKA Notice has been electronically mailed to:

0:20-cv-60163-RKA Notice has not been delivered electronically to those listed below and will be provided by other means. For further assistance, please contact our Help Desk at 1-888-318-2260.:
Charlene Walker Rosa
L06814
Florida Womens Reception Center
3700 NW 111th Place
Ocala, FL 34482-1479

A Pbendack

U.S. District Court - Southern District of Florida

Charlene Walker Rosa L06814
Florida Womens Reception Center
3700 NW 111th Place
Ocala, FL 34482-1479

Case: 0:20-cv-60163-RKA #33 3 pages Mon Nov 16 13:51:31 2020

IMPORTANT: REDACTION REQUIREMENTS AND PRIVACY POLICY

Note: This is NOT a request for information.

Do NOT include personal identifiers in documents filed with the Court, unless specifically permitted by the rules or Court Order. If you MUST include personal identifiers, ONLY include the limited information noted below:

- Social Security number: last four digits only
- Taxpayer ID number: last four digits only
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- Minor's name: initials only
- Home Address: city and state only (for criminal cases only).

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See reverse side

Appendix C

Magistrate report & recommendation

Subject:Activity in Case 0:20-cv-60163-RKA Rosa v. Satz et al Report and Recommendations
This is an automatic e-mail message generated by the CM/ECF system.
Please DO NOT RESPOND to this e-mail because the mail box is unattended.
NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court
Southern District of Florida

Notice of Electronic Filing
The following transaction was entered on 3/4/2020 1:43 PM EST and filed on 3/4/2020

Case Name: Rosa v. Satz et al

Case Number: 0:20-cv-60163-RKA

Filer:

Document Number: 14

Docket Text:
REPORT AND RECOMMENDATIONS on 42 USC 1983 case re [13] Amended Complaint filed by Charlene Walker Rosa; Recommending that the complaint should be dismissed for failure to state a claim upon which relief can be granted under § 1915(e). Such dismissal is without prejudice to seek relief if Plaintiffs conviction is at some point invalidated. It is further recommended that Plaintiffs request to consolidate this case with case no. 20-60051-CV-Altman be denied. Objections to R&R due by 3/18/2020. Signed by Magistrate Judge Lisette M. Reid on 3/4/2020. <I>See attached document for full details.</I> (fbn)

0:20-cv-60163-RKA Notice has been electronically mailed to:

0:20-cv-60163-RKA Notice has not been delivered electronically to those listed below and will be provided by other means. For further assistance, please contact our Help Desk at 1-888-318-2260.:
Charlene Walker Rosa
L06814
Florida Womens Reception Center
3700 NW 111th Place
Ocala, FL 34482-1479

Service list page 1 only

Appendix C

U.S. District Court - Southern District of Florida

Charlene Walker Rosa L06814
Florida Womens Reception Center
3700 NW 111th Place
Ocala, FL 34482-1479

Case: 0:20-cv-60163-RKA #14 10 pages Wed Mar 4 13:51:31 2020

IMPORTANT: REDACTION REQUIREMENTS AND PRIVACY POLICY

Note: This is NOT a request for information.

Do NOT include personal identifiers in documents filed with the Court, unless specifically permitted by the rules or Court Order. If you MUST include personal identifiers, ONLY include the limited information noted below:

- Social Security number: last four digits only
- Taxpayer ID number: last four digits only
- Financial Account Numbers: last four digits only
- Date of Birth: year only
- Minor's name: initials only
- Home Address: city and state only (for criminal cases only).

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IMPORTANT: ADDITIONAL TIME TO RESPOND FOR NON-ELECTRONIC SERVICE

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See reverse side

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-60163-CV-ALTMAN
MAGISTRATE JUDGE REID

CHARLENE WALKER ROSA,

Plaintiff,

v.

MICHAEL J. SATZ, et al.,

Defendants.
_____/

REPORT OF MAGISTRATE JUDGE
RE AMENDED CIVIL RIGHTS COMPLAINT-42 U.S.C. § 1983
[ECF No. 13]

I. Introduction

Plaintiff, **Charlene Walker Rosa,** a convicted felon, has filed an amended civil rights complaint, pursuant to 42 U.S.C. § 1983. [ECF No. 13]. The plaintiff is suing Broward County State Attorney Michael J. Satz, Assistant State Attorney David Frankel, Public Defender Howard Finkelstein, former Assistant Public Defender Harry Dohn Williams, Assistant State Attorney Joel Silverstein, and Assistant Attorney General Heidi Bettendorf the alleging that they violated her constitutional rights in a state criminal prosecution. [*Id.*].

This case has been referred to the undersigned for issuance of all preliminary orders and recommendations to the district court regarding dispositive motions. *See*

Appendix C

28 U.S.C. § 636(b)(1)(B),(C), Fed. R. Civ. P. 72(b), S.D. Fla. Local Rule 1(f) governing Magistrate Judges, and S.D. Fla. Admin. Order 2019-02.

Plaintiff has been granted *in forma pauperis* ("IFP") status [ECF No. 5] and is therefore subject to the screening provisions of 28 U.S.C. § 1915(e)(2). *See Farese v. Scherer,* 342 F.3d 1223, 1228 (11th Cir. 2003) ("Logically, § 1915(e) only applies to cases in which the plaintiff is proceeding IFP"). Because Plaintiff is also a prisoner, seeking redress from governmental entities, employees, or officers, his complaint is subject to screening under 28 U.S.C. § 1915A, which does not distinguish between IFP plaintiffs and non-IFP plaintiffs. *See* 28 U.S.C. § 1915A; *Thompson v. Hicks,* 213 F. App'x 939, 942 (11th Cir. 2007)(*per curiam*).

II. Plaintiff's Claim

Plaintiff has presented a repetitive hodgepodge of factual allegations concerning her claim that Defendants violated her right to due process during her criminal trial. [ECF No. 13]. In referencing her attempts to exhaust her claims, Plaintiff cites to a number of state criminal post-conviction proceedings and prior federal *habeas corpus* proceedings. [*Id.*]. Plaintiff also claims that her defense counsel was ineffective and that her conviction violated double jeopardy. [*Id.*]. She

further alleges that her conviction was the result malicious prosecution and extrinsic fraud committed by Defendants. [*Id.*].

Plaintiff contends that her conviction was the result of these alleged constitutional violations. [*Id.*]. Plaintiff further contends that she has been subjected to cruel and unusual punishment in violation of the Eighth Amendment as a result of the alleged wrongful conviction. [*Id.*]. The entirety of her complaint is an attack upon her state conviction for first degree murder as evidenced by her request to combine this case with a pending petition for writ of habeas corpus in case no. 20-60051-CV-Altman. [*Id.* at 1]

III. Standard of Review- 28 U.S.C. §1915(e)

Pursuant to 18 U.S.C. § 1915(e)(2)(B)(ii), where a plaintiff is proceeding IFP, the complaint must be dismissed if the court determines that the complaint fails to state a claim on which relief may be granted. *Wright v. Miranda,* 740 F. App'x 692, 694 (11th Cir. 2018). Pursuant to § 1915A, a case is also subject to dismissal where a plaintiff seeks redress from the government if the complaint fails to state a claim on which relief may be granted. *Id.*

In reviewing the complaint under § 1915(e), the court takes the allegations as true and construes them in the light most favorable to the plaintiff. *See Maps v. Miami Dade State Attorney,* 693 F. App'x 784, 785 (11th Cir. 2018)(*per curiam*). Complaints filed by *pro se* prisoners are held to "less stringent standards than formal

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pleadings drafted by lawyers[.]" *Haines v. Kerner,* 404 U.S. 519, 520 (1972)(*per curiam*).

In order to "avoid dismissal for failure to state a claim, a complaint must contain factual allegations that, when accepted as true, allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct." *Wright v. Miranda,* 740 F. App'x 692, 694 (11th Cir. 2018)(citing *Waldman v. Conway,* 871 F.3d 1283, 1289 (11th Cir. 2017) (*per curiam*)). Although a *pro se* pleading is liberally construed, it must still "suggest that there is some factual support for a claim." *Id.*

To state a claim for relief under § 1983, a plaintiff must show that he was deprived of a federal right by a person acting under color of state law. *See Griffin v. City of Opa-Locka,* 261 F.3d 1295, 1303 (11th Cir. 2001). Under § 1915(e)(2)(B)(i), courts may dismiss as frivolous claims that are "based on an indisputably meritless legal theory" or "whose factual contentions are clearly baseless." *Neitzke v. Williams,* 490 U.S. 319, 327 (1989); *Denton v. Hernandez,* 504 U.S. 25, 31 (1992); *Bilal v. Driver,* 251 F.3d 1346, 1349 (11th Cir. 2001).

Furthermore, the same standards govern dismissal for failure to state a claim under Fed. R. Civ. P. 12(b) and dismissal for failure to state a claim under § 1915(e)(2)(B)(ii). *Mitchell v. Farcass,* 112 F.3d 1483, 1490 (11th Cir. 1997). Thus, under 28 U.S.C. § 1915(e)(2)(B)(ii), the court may dismiss a complaint that fails "to

state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009).

Although federal courts give liberal construction to *pro se* pleadings, courts "nevertheless have required them to conform to procedural rules." *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007)(*per curiam*)(quotation omitted). Rule 8 requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). There is no required technical form, but "each allegation must be simple, concise, and direct." *Id.* at 8(d)(1). The statement must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007)(quotation omitted)(ellipses in original). Additionally, each separate claim should be presented in a separate numbered paragraph, with each paragraph "limited as far as practicable to a single set of circumstances." Fed. R. Civ. P. 10(b).

"Precedent also teaches, however, that a court, of course, should not abandon its neutral role and begin creating arguments for a party, even an unrepresented one." *Sims v. Hastings,* 375 F.Supp.2d 715, 718 (N.D. Ill. 2005)(citing *Anderson v. Hardman,* 241 F.3d 544, 545 (7th Cir. 2001). When read liberally, a *pro se* pleadings

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"should be interpreted 'to raise the strongest arguments that [it] suggest[s].'" *Graham v. Henderson,* 89 F.3d 75, 79 (2d Cir. 1996)(quoting *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir. 1994)).

IV. Discussion

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that, before a plaintiff may proceed with a § 1983 action "to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," he must prove that the conviction or sentence had already been invalidated. 512 U.S. at 486-87. If the plaintiff fails to demonstrate that the conviction or sentence has been reversed, expunged, or otherwise invalidated, any claim must be dismissed if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. In a later decision, the Supreme court announced that "a state prisoner's§ 1983action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005).

Here, Plaintiff seeks to invalidate her conviction claiming that it was the result of unconstitutional actions by the prosecutor and her defense attorney. She argues

that the prosecution and defense counsel colluded to violate her constitutional rights. She claims that her conviction was the result of a malicious prosecution by the Broward State Attorney and that her defense counsel was complicit.

It is exactly this type of claim that the Eleventh Circuit has found not cognizable in civil rights action. *See Abella v. Rubino*, 63 F.3d 1063, 1066 (11th Cir. 1995)(finding plaintiff's claims that he was the "victim of an unconstitutional conspiracy to falsely convict him" were in the nature of habeas corpus claims and therefore not cognizable under § 1983). *Id.* Since the Plaintiff's conviction has not been invalidated, her complaint should be dismissed.

V. Recommendations

Based upon the foregoing, it is recommended that the complaint should be dismissed for failure to state a claim upon which relief can be granted under § 1915(e). Such dismissal is without prejudice to seek relief if Plaintiff's conviction is at some point invalidated. It is further recommended that Plaintiff's request to consolidate this case with case no. 20-60051-CV-Altman be denied.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar a party from a *de novo* determination by the District Judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or

Appendix C

adopted by the District Judge except upon grounds of plain error or manifest injustice. *See* 28 U.S.C. §636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985).

SIGNED this 4th day of February, 2020.

UNITED STATES MAGISTRATE JUDGE

cc: Charlene Walker Rosa
L06814
Florida Women's Reception Center
3700 NW 111th Place
Ocala, FL 34482-1479
PRO SE

Note
Entered 03/04/2020
Signed 4th of February 2020

Appendix C

Appendix A

11th circuit rehearing

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 03, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-11386-CC
Case Style: Charlene Walker Rosa v. Michael Satz, et al
District Court Docket No: 0:20-cv-60163-RKA

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Carol R. Lewis, CC/lt
Phone #: (404) 335-6179

REHG-1 Ltr Order Petition Rehearing

Appendix d

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11386-CC

CHARLENE WALKER ROSA,

Plaintiff - Appellant,

versus

MICHAEL J. SATZ,
BROWARD COUNTY STATE ATTORNEY,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JILL PRYOR, LUCK and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

Appendix d

Appendix E.

habeas proceeding

U.S district Anderson adopting magistrate--

U.S 11th order denying COA

Appendix F

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12339-C

CHARLENE TERRY-ANN WALKER ROSA,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Charlene Terry-Ann Walker Rosa moves for a certificate of appealability ("COA") in order to appeal the dismissal of her 28 U.S.C. § 2254 petition for writ of habeas and denial of her Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. To merit a COA, Rosa must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because Rosa failed to make a substantial showing of the denial of a constitutional right, her motion for a COA is DENIED.

Rosa's motion for appointment of counsel is also DENIED AS MOOT.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

Appendix E

Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.call.uscourts.gov

March 07, 2019

Charlene Terry-Ann Walker Rosa
Lowell CI - Inmate Legal Mail
11120 NW GAINESVILLE RD
OCALA, FL 34482-1479

Appeal Number: 18-12339-C
Case Style: Charlene Walker Rosa v. State of Florida, et al
District Court Docket No: 0:16-cv-62332-BB

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

*Copy of our order entered on January 07, 2019, is enclosed.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Walter Pollard, C/lt
Phone #: (404) 335-6186

MOT-2 Notice of Court Action

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-cv-62332-BLOOM/WHITE

CHARLENE TERRY-ANN WALKER ROSA,

Petitioner,

v.

JULIE L. JONES,
SEC'Y, FLA. DEP'T OF CORR'S,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

THIS CAUSE is before the Court upon *pro se* Petitioner's Petition for Writ of Habeas Corpus, ECF No. [7], filed pursuant to 28 U.S.C. § 2254 (the "Petition"), which was previously referred to the Honorable Patrick A. White for a Report and Recommendation on any dispositive matters. *See* ECF No. [3]. On April 2, 2018 Judge White issued a Report and Recommendation (the "Report"), recommending that the Petition be denied on the merits as to claims 1, 2, and 4 and procedurally barred as to claim 3. *See* ECF No. [53]. The Report also recommended that a certificate of appealability be denied and that the case be closed. In the Report, Petitioner was advised that "[o]bjections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report." *Id.* at 38. She then timely filed Objections and separately filed an Application for Certificate of Appealability. *See* ECF Nos. [54] and [59]. The Court has since conducted a *de novo* review of Magistrate Judge White's Report and Recommendation, Petitioner's Objections, the record, and is otherwise fully advised. *See Williams v. McNeil*, 557 F.3d 1287, 1291 (11th Cir. 2009) (citing 28 U.S.C. § 636(b)(1)).

Appendix E-

I. BACKGROUND

Petitioner was charged with first-degree murder of Lola Salzman by bludgeoning and/or stabbing with a knife in violation of Florida Statute § 782.04(1). *See* ECF No. [30-1] at 13-14. On July 5, 2007, the jury found Petitioner guilty of first-degree murder and she was sentenced to a term of life in prison without the possibility of parole. *Id.* at 16-22. After a lengthy history of proceedings in state court, Petitioner timely filed her Petition for habeas relief in this tribunal. *See* ECF No. [1]. The Report summarized Petitioner's four claims as follows:

> 1. Ineffective assistance of counsel where counsel's opening statements prejudiced her from receiving a fair trial. Petitioner's conviction was obtained by an involuntary concession of guilt without understanding the nature of the charge and the consequences of a plea since Counsel did not have Petitioner's affirmative, explicit consent to concede her guilt. Counsel's opening and closing statements, and cross examination of witnesses were a demonstration of evidence conceding Petitioner's guilt.
>
> 2. Ineffective assistance of counsel where:
>
> (A) Counsel was ineffective for conceding to the authenticity of the telephone conversations;
>
> (B) Counsel elicited testimony that Petitioner's blood was found on a picture on a wall at the crime scene
>
> (C) Counsel admitted to or failed to challenge evidence presented that Petitioner extorted a friend to collect payment from the victim.
>
> (D) Counsel knowingly presented false testimony that Petitioner had a scar on her hand and that she showed it to police at the time of the arrest as evidence that the scar was a result of the "alleged murder" of the victim;
>
> (E) Counsel informed the jury that Petitioner left the country because of her consciousness of guilt;
>
> (F) Counsel conceded to facts in the prosecution's case without Petitioner's consent, which denied meaningful adversary testing; and
>
> (G) Counsel refused to "strategize" with Petitioner.

3. Ineffective assistance of counsel where Petitioner was shackled throughout the entire trial in front of the jury, which prejudiced the Petitioner in violation of her right to a fair trial.

4. Ineffective assistance of counsel where counsel failed to:

(A) Call Dr. Edward Greenburg to testify as an expert witness who would have stated that the victim died of natural causes. Counsel improperly conceded that the victim died as a result of 43 stab wounds; and

(B) Assert an alibi defense with the testimony of Thomas Fairbough.

ECF No. [53] at 2-4. Ultimately, the Report concluded that, as to claims 1, 2, and 4, the Petition failed on the merits and, as to claim 3, it was procedurally barred for failure to exhaust the remedy in state court.

II. OBJECTIONS

Petitioner's lengthy Objections raise multiple arguments, which the Court summarizes as follows: (1) the Report did not contain a verbatim recitation of her four claims for relief; (2) Petitioner did not receive the assistance of counsel to prepare her Petition and did not know she could file additional grounds for habeas relief; (3) the Report should have not relied upon the recitation of facts contained within the opinion issued by Florida's Fourth District of Appeals in her direct appeal; (4) claim 3 is not procedurally barred because she has uncovered new evidence of her actual innocence; (5) the Report erred in finding that claim 1 did not constitute ineffective assistance of counsel; and (6) the Report misconstrued her position as to claim 2(a) regarding the authenticity of telephone conversations. *See* ECF No. [54]. In addition, Petitioner separately filed an Application for Certificate of Appealability. The Court addresses each issue in turn.

a. Objection Number 1

Petitioner did not object to the recommendation that claims 2(B) through 2(G) and 4 be denied on the merits, other than to argue that the report failed to verbatim recite all claims and

supporting facts from her Petition. She claims that this failure rendered the Report inadequate and deprived her of a fair and impartial review of her constitutional claims. *See* ECF No. [54] at 6-9. However, Judge White explicitly states in the Report that he reviewed the Petition at ECF No. [7], and he accurately summarized each of Petitioner's claims. *See* ECF No. [53]. The Report need not include a word-for-word recitation of all claims and facts. The Report reflects that Judge White meticulously analyzed each of the four claims in the Petition along with all subparts and the underlying record. *Id.* Therefore, Petitioner's objection is without merit and is overruled. And, because Petitioner did not raise any substantive objections to the recommendation that claims 2(B) through 2(G) and claim 4 be denied on the merits, she has foregone the right to otherwise object to the legal analysis and factual findings made by Judge White as to these specific claims.

b. Objection Number 2

Petitioner next contends that conflict-free counsel should have been appointed to assist her with the preparation of her Petition. It should be noted that prior to the instant objection, Petitioner filed no less than four motions requesting the appointment of counsel and on four occasions, Petitioner's request was denied. *See* ECF Nos. [10], [11], [32], [39], [49], [50], [57], [58]. In support of her objection, Petitioner argues that she is financially indigent and cannot afford counsel and lacks the intellectual ability to properly articulate legal arguments in support of her request for habeas relief. *See* ECF No. [54]. More specifically, Petitioner states she has an intellectual quotient of 72 and is, therefore, intellectually disabled, referring to a report prepared by the Department of Corrections.

A petitioner does not have a constitutional right to counsel during post-conviction collateral attack proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("Our cases

establish that the right to appointed counsel extends to the first appeal of right, and no further. . . . We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori,* he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process."). The decision whether to appoint counsel on a petition for habeas relief is subject to the discretion of the trial court and "will not be overturned absent a showing of fundamental unfairness which impinges on the due process rights of the petitioner." *Vandenades v. United States*, 523 F.2d 1220, 1225–26 (5th Cir. 1975).

Really? You are so bias To say such thing

Petitioner's claim of intellectual disability is belied by the record. While she attached an Intake Psychological Screening report dated July 10, 2007 to support her fourth Motion for Appointment of Conflict-Free Counsel, ECF No. [57], indicating that her IQ is 72, the report also concluded she has no mental retardation and does not suffer from any mildly impaired adaptive functions. *Id.* at 21. Further, a review of the record reveals that Petitioner has filed lengthy, eloquent, and detail-oriented filings throughout the proceedings in which she has cited to relevant standards, case law, and the state-court record. Contrary to her claim, her filings reveal she is able to articulate legal arguments in support of her request for relief. Because the record does not reveal a need for an evidentiary hearing, the appointment of counsel is not mandatory, and there has been no showing that the interest of justice requires an appointment of counsel, Petitioner's objection on this basis is overruled. *See* Rules Governing Section 2254 Cases Rule 8(c); see *McGriff v. Dept. of Corr's*, 338 F.3d 1231 (11th Cir. 2003); *Thomas v. Scott*, 47 F.3d 713, 715 (5th Cir. 1995).

Also intertwined with this objection is Petitioner's claim that this Court only allowed her to pursue four of her thirty claims for habeas relief. *See* ECF No. [54] at 2. Petitioner states that

N

the Court ordered her to file an amended motion and only allowed her to use the space provided in the form, preventing her from adding extra pages. *Id.* Again, Petitioner's claim is belied by the record. Although the Court required that she use the form petition, she was repeatedly informed that her motion and its incorporated memorandum of law could be up to twenty pages excluding the title page, signature pages, certificates of good faith, and certificate of service. *See* ECF No. [4]. In addition, Petitioner was informed that she could file an amended petition within the twenty-page limit and could *exceed* such a limitation with prior leave of court and upon a showing of good cause. *Id.* The Order did not limit Petitioner to the space provided within the form and did not prevent her from adding pages. *Id.* Despite this, Petitioner opted to file a sixteen-page application, raising only four claims, and never requested leave of Court to file a petition exceeding twenty pages so that she could raise all thirty claims for relief. The Court, therefore, finds this objection to be without merit.

c. Objection Number 3

Next, Petitioner objects to the Report's reliance upon and recitation of facts contained within the Fourth District of Appeals' opinion issued in her direct appeal. *See* ECF No. [54] at 9-12. She argues that, because she did not receive effective assistance of counsel during the trial, the facts as explained in the appellate court should not be considered as she "denie[s] all the allegations in the direct appeal." *Id.* at 11. The Court finds no error in the Report's reliance upon and recitation of facts from the Fourth District Court of Appeals' decision when discussing the underlying facts of the offense and procedural history. The appellate court's opinion provides a recitation of the evidence presented at trial, regardless of whether Petitioner disagrees with the veracity of such evidence and how her case was presented to the jury. As further

explained below, this Court finds that Petitioner failed to prove her claims of ineffective assistance of counsel, rendering her objection on this point moot.

d. Objection Number 4

As to her next objection, Petitioner argues that claim 3 is not procedurally barred. She does not dispute Judge White's conclusion that she failed to exhaust claim 3 in state court by waiting to raise the claim until her third amended motion for post-conviction relief filed on January 2, 2015. Instead, she argues that the Court should consider an exception to the procedural time bar to prevent a miscarriage of justice. *See* ECF No. [54] at 13. Specifically, she asserts a claim of actual innocence, which allows consideration of a time-barred or procedurally-barred claim. *See McQuiggin v. Perkins*, 569 U.S. 383 (2013). While Petitioner is correct that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar," the Supreme Court has explained that "tenable actual-innocence gateway pleas are rare." *McQuiggin*, 569 U.S. at 386. A prisoner may present a constitutional claim, such as ineffective assistance of counsel, on the merits despite a procedural bar only upon a "credible showing of actual innocence." *Id.* at 392–93. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with **new reliable evidence**—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (emphasis added). "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, **in light of the new evidence**, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin*, 569 U.S. at 386 (citing *Schlup*, 513 U.S. at 329 and *House v. Bell*, 547 U.S. 518, 538 (2006) (emphasis added)). "The gateway should open only when a petition presents '**evidence** of

innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* at 401 (emphasis added). It should also be noted that "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing." *McQuiggin*, 569 U.S. at 399. Such unexplained delay "should seriously undermine the credibility of the actual-innocence claim." *Id.* at 400.

In support of her objection, Petitioner argues that on June 29, 2017, she discovered "new evidence" when the prison law librarian, Ms. Green, informed her that the computer revealed an amended indictment or information[1] filed on August 23, 2007 – one month after she was convicted. *Id.* at 14. This amended document charged Petitioner with two counts: first-degree murder (Count I) and "'Solicit to Commit Robbery" (Count II). *Id.* According to Petitioner, this newly discovered evidence was filed of record on August 23, 2007 by the Hallandale Police Department in Case No. 062005CF01014414A88810 and established that the State conceded defense counsel's theory of solicitation in which Petitioner solicited Ivan McKenzie a/k/a Dutch to extort payment from the victim and that it was Dutch – not Petitioner – who killed the victim. *Id.* Had the State presented the amended charging document to defense counsel prior to trial, Petitioner argues that her counsel would not have pursued a strategy in which he admitted to third-degree murder. *Id.* at 16.

Despite these arguments, Petitioner has not presented the Court with any evidence of her actual innocence. She simply provides allegations that the prison law librarian, Ms. Green, informed her of the August 23, 2007 amended indictment or information. Petitioner did not

[1] It is unclear whether Petitioner claims the State filed an amended indictment or amended information as she uses the two words interchangeably in her Objections. *See* ECF No. [54] at 14-16.

supply the Court with a copy of the alleged amended indictment or information that forms the basis of her claim of actual innocence or an affidavit from Ms. Green attesting to the discovery. Instead, Petitioner simply provides an unsubstantiated allegation, which falls far short of satisfying the demanding standard articulated in *Schlup*. Given the lack of evidence, the Court cannot evaluate the claim to determine whether it supports Petitioner's actual innocence argument.

The Court also finds no merit in the argument that an amended information or indictment filed in August of 2007 in the public docket of the Seventeenth Judicial Circuit in and for Broward County, Florida constitutes *newly discovered* evidence. Had Petitioner exercised any degree of diligence, she could have discovered such readily available information. Even if she truly "discovered" this public filing on June 29, 2017, Petitioner still waited until after the issuance of the Report (more than nine months) to raise her actual innocence argument and did so without any supporting evidence. Petitioner's failure to supply any reliable evidence and her unexplained delay in raising this argument fail to satisfy the exacting standard under *Schlup*. *See Jemison v. Nagle*, 158 F. App'x 251, 256 (11th Cir. 2005) (holding that the district court did not abuse its direction in failing to conduct an evidentiary hearing when the petitioner did not produce any reliable evidence to support the claim of actual innocence, such as the allegedly exculpatory DNA report or its results). For these reasons, Petitioner cannot avail herself of this exception to resurrect her procedurally barred claim of ineffective assistance of counsel - claim 3. Petitioner's objection is, therefore, overruled.

e. Objection Number 5

Next, Petitioner argues that defense counsel lacked the authority to waive her right against self-incrimination and her right to confront her witnesses when her counsel informed the

jury that the essential facts and elements of the prosecution's case were not in dispute and made a concession of guilt as to lesser-included offenses. *See* ECF No. [54] at 20-26. This objection relates to Judge White's recommendation that claim 1 be denied on the merits because Petitioner failed to demonstrate that her counsel's performance was deficient and prejudicial. *Id.*

Section 2254(d) only allows federal courts to grant habeas relief if the state court's resolution of those claims: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). Applying this standard, a state court's decision will be deemed "contrary to" clearly established Supreme Court precedent if either (1) "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000).

In a § 2254 petition for habeas relief based on a claim of ineffective assistance of counsel, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). This is *not* the same as asking whether defense counsel's performance fell below *Strickland*'s standard. *Id.* Under *Strickland*, a habeas petitioner was must satisfy a two-prong inquiry: (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard

itself." *Id.* "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)). "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by th[e Supreme] Court." *Id.* (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 122 (2009)). This standard under § 2254 was intended to be a difficult one to satisfy. *Id.* at 102 ("If this standard is difficult to meet, that is because it was meant to be.").

The Court must now apply these principles to Petitioner's claim that her counsel's performance was ineffective when he allegedly waived her right against self-incrimination as well as her right to confront her witnesses by conceding her guilt to lesser-included offenses. When the state trial court ruled on this claim and denied the habeas relief, it adopted the State's arguments contained within its response brief. *See* ECF No. [30-1] at 658. The State, in turn, argued that defense counsel never conceded Petitioner's guilt to the crime charged – first degree murder – and instead made arguments in closing argument that she was a principal to a third-degree murder only after the State presented its evidence and that this tactic was a matter of trial strategy to admit only a lesser-included offense. *Id.* at 633-634. Under *Strickland*, Petitioner bears the burden of proving that her counsel's concession "was objectively unreasonable and that, but for the concession, a reasonable probability exists that the outcome of his trial would have been different." *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1249–53 (11th Cir. 2011). The Court now considers whether Petitioner's objection to the Report has merit.

The Eleventh Circuit Court of Appeals has considered similar claims of ineffective assistance of counsel. *See e.g. McNeal v. Wainwright*, 722 F.2d 674, 676–77 (11th Cir. 1984).

In *McNeal*, the defendant was also charged with first-degree murder and received a life sentence. *Id.* Much like in this case, McNeal's counsel never stated that he was guilty of murder and instead argued that the government had, at most, proven manslaughter as there was no evidence of premeditation. *Id.* Finding that "[a]n attorney's strategy may bind his client even when made without consultation" and that there was an overwhelming amount of evidence against McNeal, the Eleventh Circuit held that it "cannot be said that the defense strategy of suggesting manslaughter instead of first degree murder was so beyond reason as to suggest defendant was deprived of constitutionally effective counsel." *Id.* (citing *Thomas v. Zant*, 697 F.2d 977, 987 (11th Cir. 1983)). More recently, the Eleventh Circuit denied habeas relief for a similar ineffective assistance of counsel claim, finding no error in the Florida Supreme Court's determination that the petition failed to prove a deficient performance or prejudice under *Strickland*. *See Atwater v. Crosby*, 451 F.3d 799, 809 (11th Cir. 2006) (finding that Florida Supreme Court did not unreasonably apply or reach a decision contrary to clearly established federal law when, in light of the overwhelming evidence of guilt presented by the state and in an effort to save the defendant's life, defense counsel argued in closing that there was no evidence of premeditation but that the evidence may support second-degree murder). In a thorough analysis of the *Strickland* prejudice prong, the Eleventh Circuit more recently denied habeas relief when the Florida Supreme court reasoned that a concession to first-degree murder during opening statement "merely restated facts that the jury would soon hear when the State introduced [the defendant's] confession into evidence." *Harvey*, 629 F.3d at 1252. Although defense counsel in *Harvey* conceded first-degree murder in opening without first consulting the defendant, the Eleventh Circuit determined that the Florida Supreme Court's finding of no prejudice was not "an unreasonable determination of the facts." *Id.* (quoting 28 U.S.C. §

2254(d)(2)). This is because the State's evidence against the defendant was overwhelming and included his confession, making it "very difficult to see how the outcome of the trial would have been different had Watson not conceded Harvey's guilt, as charged in the indictment." *Id.*

Petitioner argues the Report unreasonably concluded that the concession of guilt was a trial strategy as such a concession was a departure from constitutional principles established by the United States Supreme Court. *See* ECF No. [54] at 24. She further contends that due process does not allow an attorney to admit facts that amount to a guilty plea without the client's consent and that her entry of a not guilty plea required the State to prove the charged offense and any lesser-included offenses beyond a reasonable doubt. *Id.* at 24-25. According to Petitioner, defense counsel's presentation to the jury was "the functional equivalent of a guilty plea," demonstrating that she satisfied both prongs of *Strickland*. *Id.* at 25.

Upon review of the record, the Court concludes that the state court's resolution of this ineffective assistance of counsel claim did not result in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" and did not result "in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). During opening statement, defense counsel did *not* concede that Petitioner was guilty of the crime charged, first-degree murder. To the contrary, defense counsel repeatedly stated in opening that "Ms. Rosa did not kill Lola Salzman." *See* ECF No. [31-1] at 367-368. Instead, defense counsel provided a preview of the State's evidence consisting of telephone calls in which Petitioner admitted she enlisted Dutch's assistance to collect money owed by the victim and that the encounter with the victim went awry when she

took a knife and swung it at Petitioner. *Id.* at 364, 366. Defense counsel then argued that Dutch killed the victim. *Id.*

During trial, the State presented evidence that the victim's neighbor saw Petitioner walk into the victim's apartment on the date of her death, July 4, 2002, and later leave hurriedly from the apartment. *See Rosa v. State*, 27 So. 3d 718 (Fla. 4th DCA 2010). Three of Petitioner's fingerprints were found at the scene. *Id.* Cell phone records also confirmed that Petitioner made numerous calls from the victim's apartment on the date of her death. *Id.* Also on this date, Petitioner changed her upcoming departure flight to Jamaica from July 11, 2002 to July 5, 2002 and then again from July 5, 2002 to the evening of July 4, 2002 – the day the victim was killed. *Id.* She then travelled to Jamaica using a passport in the name of "Alicia Lueyen." *Id.* Tape recordings of Petitioner's conversations revealed that she admitted to sending Dutch to collect money from the victim and then stated that Dutch hit the victim with a phone when she threatened to call the police. *Id.* In other taped conversations, she provided conflicting information, stating that she went to a lady's house to collect money on one call, that she did not know what happed to the lady but she probably died in another call, and that she did not know anything about the victim in yet another call. *Id.* And, after her arrest, she voluntarily stated that she worked as an aide for the victim, confronted her about the money owed with her friend Frost, and when doing so, the victim attempted to stab her with a knife. *Id.* Frost then struck the victim in the face followed by them leaving the victim on the floor and driving away in the same vehicle the neighbor described. *Id.*

At the close of the State's case, the Court, the State and defense counsel discussed the inclusion of several lesser-included offenses on the verdict form and in the jury instructions, such as first-degree murder, second-degree murder, third-degree murder, and manslaughter. *See* ECF

No. [31-1] at 1233-1234. The inclusion of these lesser offenses formed part of defense counsel's trial strategy. *Id.* at 1344 ("[T]hat's our theory, Dutch killed her. She set this course of action in motion by asking Dutch to get her money."). At the commencement of the charge conference, the Court turned to the Petitioner and said: "Ms. Rosa, you need to participate in this process." *Id.* at 1234. Petitioner did not voice any objection to the inclusion of the lesser-included offenses in the jury instructions at any point during the charge conference. *See* ECF No. [31-1] at 1233-1252. Thereafter, in closing argument, Petitioner's counsel argued as follows:

> I have never, since this trial started, asserted to you that my client was innocent or was not involved, I would lose all credibility with you if I did, but what I have come before you to say is that my client is not guilty, not guilty of first degree murder; rather, my client committed a much lesser crime, and you're going to get an instruction on that, and that crime is that she committed the crime of third degree murder. That's why we're here today.

See ECF No. [31-1] at 1338.

Given the overwhelming evidence presented by the State against Petitioner, it cannot be said that the defense strategy of conceding third-degree murder instead of first-degree murder "was so beyond reason as to suggest defendant was deprived of constitutionally effective counsel." *McNeal v. Wainwright*, 722 F.2d 674, 676–77 (11th Cir. 1984). In fact, as pointed out in closing, defense counsel believed the defense would have lost credibility had he argued that Petitioner was innocent or not involved at all. *See* ECF No. [31-1] at 1338. "In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" *Fla. v. Nixon*, 543 U.S. 175, 192 (2004); *see also Atwater v. Crosby*, 451 F.3d 799, 809 (11th Cir. 2006). Petitioner likewise failed to present any evidence of prejudice by the comments made during opening as defense counsel simply

restated the facts that the State would introduce at trial. *Harvey*, 629 F.3d at 1252. And, in light of the vast amount of evidence presented by the State, Petitioner failed to demonstrate that the outcome of the trial would have been any different had defense counsel not conceded a lesser-included offense. *Id.* Based on the foregoing, the Court cannot conclude that the state trial court unreasonably applied or reached a decision contrary to clearly established federal law or unreasonably determined the facts in light of the evidence presented in the state court proceeding. Thus, Petitioner's claim number 1 is denied on the merits and her objection to the Report is overruled.

f. Objection Number 6

Petitioner's final objection relates to claim 2(a). She argues that the Report misconstrued her position regarding the authenticity of telephone conversations. *See* ECF No. [54] at 27. According to the Objections, her position is not that her counsel was ineffective by failing to object to the presentation of the recorded telephone conversations. *Id.* Instead, she states she "wants the State to present its alleged telephone conversations and all it [sic] evidence to the jury. What she is saying is that she object [sic] to the authenticity of the alleged tapes and all the state evidence for the jury to decide the credibility of the witnesses and the state entire evidence, she is entitle [sic] to that absent that right the jury verdict is unreliable." *Id.* On the one hand, she does not fault her defense counsel for failing to object to the admission of the recorded conversations because she wants the State to present the evidence to the jury and, on the other hand, she objects to the authenticity of the tapes and wants the jury to decide the credibility of the witnesses. Petitioner's objection is irreconcilably inconsistent and unintelligible. To the extent Petitioner claims her attorney was ineffective for not objecting to the authenticity of the

tapes, the Court adopts Judge White's well-reasoned analysis on this point. Therefore, this objection is also overruled.

g. Certificate of Appealability

Finally, Petitioner filed a separate Application for Certificate of Appealability. *See* ECF No. [59]. The Court first finds that Petitioner's Application for Certificate of Appealability is untimely as it is, in reality, a belated objection to Judge White's recommendation that no Certificate of Appealability be issued. *See* ECF No. [59]. Petitioner was cautioned in the Report that she had fourteen days upon her receipt to file her objections with the district court. *See* ECF No. [53] at 38. Although her objections, addressed above, were timely filed, her Application for Certificate of Appealability, which is an additional objection, was not. Petitioner admittedly received the Report on April 6, 2018. *See* ECF No. [54] at 1. She was, therefore, required to provide *all* of her objections to prison officials for mailing no later than April 20, 2018 under the prisoner mailbox rule. *See Newnam v. McDonough*, 2008 WL 539065 (N.D. Fla. Feb. 22, 2008) (citing *Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001)) (noting that pursuant to the prisoner mailbox rule, "a pleading is considered filed by an inmate on the date it was delivered to prison authorities for mailing, which (absent contrary evidence) the court assumes is the date he signed it"); *see also Garvey v. Vaughn*, 993 F.2d 776, 783 (11th Cir. 1993) (stating that "the date of filing shall be that of delivery to prison officials of a complaint or other papers destined for district court for the purpose of ascertaining timeliness"). Although Petitioner did not date the Certificate of Service, prison officials at Homestead Correctional Institutional stamped the legal mail as received by them on April 25, 2018. *See* ECF No. [59] at 1, 14. Thus, Petitioner failed to timely file this specific objection to the Report as it was filed five days after the deadline.

Despite the untimeliness of the objection, the Court will consider the merits of the request. As explained in Judge White's Report, a certificate of appealability should only be issued if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court rejects the Petitioner's constitutional claims on the merits, the Petitioner must establish that reasonable jurists would find such an assessment of the constitutional claims to be debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If the district court rejects a claim for procedural reasons, then the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Petitioner has made no such showing as to the Report's denial of claims 1, 2 and 4 on the merits or the denial of claim 3 on procedural grounds. Indeed, the arguments she raises are simply a recitation of the same arguments raised in her Objections, which the Court rejected above and are not subject to debate by reasonable jurists. Thus, Petitioner's objection to Judge White's recommendation that a Certificate of Appealability be denied is also overruled.

In sum, the Court finds Judge White's Report to be well reasoned and correct. The Court agrees with the analysis in Judge White's Report, finds no merit in Petitioner's Objections, and concludes that the Petition must be denied on the merits as to claims 1, 2, and 4 and dismissed as procedurally barred as to claim 3 for the reasons set forth in the Report.

For the foregoing reasons, it is **ORDERED and ADJUDGED** as follows:

1. Magistrate Judge White's Report and Recommendation, **ECF No. [53]**, is **ADOPTED**;

2. Petitioner's Petition, **ECF No. [7]**, is **DENIED** on the merits as to claims 1, 2, and 4 and **DISMISSED** as procedurally barred as to claim 3;

3. Petitioner's Objections, **ECF No. [54]**, are **OVERRULED**;

4. Petitioner's Application for Certificate of Appealability, **ECF No. [59]**, is **DENIED.** No Certificate of Appealability shall issue;

5. All pending motions are **DENIED AS MOOT**; and

6. The Clerk shall **CLOSE** this case.

DONE and ORDERED in Miami, Florida, this 31st day of May, 2018.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Charlene Terry-Ann Walker Rosa
L06814
Homestead Correctional Institution
Inmate Mail/Parcels
19000 SW 377th Street
Florida City, FL 33034
PRO SE

The Honorable Patrick A. White

Appendix F

4th DCA Direct Appeal 2010

Rosa v. State

Court of Appeal of Florida, Fourth District

January 27, 2010, Decided

No. 4D07-2778

Reporter
27 So. 3d 718 *; 2010 Fla. App. LEXIS 533 **; 35 Fla. L. Weekly D 239

CHARLENE ROSA, Appellant, v. STATE OF FLORIDA, Appellee.

Subsequent History: Rehearing denied by ***Rosa** v. State, 2010 Fla. App. LEXIS 3318 (Fla. Dist. Ct. App. 4th Dist., Mar. 12, 2010)*

Appeal dismissed by ***Rosa** v. State, 77 So. 3d 1255, 2011 Fla. LEXIS 2993 (Fla., Dec. 27, 2011)*

Post-conviction proceeding at, Remanded by ***Rosa** v. State, 78 So. 3d 674, 2012 Fla. App. LEXIS 987 (Fla. Dist. Ct. App. 4th Dist., Jan. 25, 2012)*

Dismissed by ***Rosa** v. State, 153 So. 3d 909, 2014 Fla. LEXIS 3168 (Fla., Oct. 21, 2014)*

Dismissed by ***Rosa** v. State, 173 So. 3d 965, 2015 Fla. LEXIS 1581 (Fla., July 24, 2015)*

Dismissed by ***Rosa** v. State, 2015 Fla. LEXIS 1834 (Fla., Sept. 1, 2015)*

Post-conviction relief denied at ***Rosa** v. State, 224 So. 3d 237, 2017 Fla. App. LEXIS 2813 (Fla. Dist. Ct. App. 4th Dist., Mar. 2, 2017)*

Related proceeding at, Writ dismissed by ***Rosa** v. State, 2017 U.S. Dist. LEXIS 111639 (S.D. Fla., July 17, 2017)*

Dismissed by ***Rosa** v. State, 2017 Fla. LEXIS 1815 (Fla., Sept. 7, 2017)*

Magistrate's recommendation at, Habeas corpus proceeding at ***Rosa** v. Jones, 2018 U.S. Dist. LEXIS 56733 (S.D. Fla., Apr. 2, 2018)*

Prior History: [**1] Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jeffrey R. Levenson, Judge; L.T. Case No. 2004010827CF10A.

Core Terms

polygraph, defense counsel, mistrial, trial court, polygraph examination, curative instruction, cross-examination, murder, impeach

Case Summary

Procedural Posture
Defendant sought review of a judgment from the Circuit Court for the Seventeenth Judicial Circuit, Broward County (Florida), which convicted him of first degree premeditated murder, and which imposed a life sentence upon him.

Overview
Defendant argued that the trial court erred in denying a defense motion to cross-examine a state witness concerning the results of a polygraph examination and in denying his subsequent motion for mistrial. Upon review, the court noted that there was no agreement between the State and defense allowing the admission of the polygraph examination. Thus, the trial court properly denied defendant's request to cross-examine the witness about the polygraph examination. However, when the witness indicated that he had go to the State attorney's office to take a polygraph, the issue arose for a second time. The trial court did fashion a curative instruction to protect any harm the single word could have caused. Not only was the mere mention of the polygraph was not the same as indicating the results thereof, but the comment was elicited during cross-examination by defense counsel who wanted to question the witness on the polygraph. Finally, the court found that there were multiple witnesses and substantial evidence inculpating defendant. Accordingly, the trial court did not err in denying the miss trial.

Outcome
The court affirmed the trial court's judgment.

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LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > ... > Scientific Evidence > Lie Detection > Polygraphs

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN1[] **Abuse of Discretion, Evidence**

The admissibility of evidence lies in the sound discretion of the trial court; an appellate court will not reverse a ruling unless there has been a clear abuse of that discretion. This general rule is tempered by Florida's more conservative approach to the admission of polygraph evidence. Absent an agreement between the state and defense, the results of a polygraph examination are inadmissible because they have not been shown to be sufficiently reliable to warrant their use in judicial proceedings.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Mistrial

Criminal Law & Procedure > Trials > Motions for Mistrial

HN2[] **Abuse of Discretion, Mistrial**

A motion for mistrial is left to the sound discretion of the trial court. An appellate court reviews such decisions for an abuse of discretion. A mistrial should be granted only when the error vitiates the entire trial. Not every reference to a polygraph exam is inadmissible, nor does every improper admission of the taking of a polygraph exam require a mistrial.

Counsel: Carey Haughwout, Public Defender, and Ellen Griffin, Assistant Public Defender, West Palm Beach, for appellant.

Bill McCollum, Attorney General, Tallahassee, and Heidi L. Bettendorf, Assistant Attorney General, West Palm Beach, for appellee.

Judges: MAY, J. POLEN and GERBER, JJ., concur.

Opinion by: MAY

Opinion

[*719] MAY, J.

One little word--polygraph--does not merit a reversal of the defendant's conviction for first degree premeditated murder and life sentence. Among other issues, the defendant argues the trial court erred in denying a defense motion to cross-examine a state witness concerning the results of a polygraph examination and the court's denial of a subsequent motion for mistrial. We find no error and affirm.

The State indicted the defendant for first degree premeditated or felony murder for the stabbing death of the victim. The defendant worked as a caretaker for the victim, who was in her 70's. The victim often required her caretakers to [*720] come back to collect their money days after it was due.

The victim was seen alive on July 3, 2002. Although the date of death is uncertain, [**2] phone records and an autopsy report indicate that the victim died on July 4, 2002. On that date, the victim's neighbor saw the defendant outside, then walk into the victim's apartment, and later leave hurriedly alone in her burgundy Ford F-150 truck.

A friend of the defendant's testified that the defendant had been scheduled to travel to Jamaica on July 11, 2002, and had asked her to care for the victim while she was gone. On July 4, 2002 the defendant called her friend from the victim's phone and told her that the victim was not paying her monies that were due. The defendant also changed her plane reservation from July 11th to July 5th, and again changed the reservation to leave on the evening of July 4th. She told her friend that she needed to leave early because her child was sick.

The police discovered the victim's body on July 17, 2002. The victim had been stabbed forty-three times. The only signs of criminal activity were in the bedroom and a small amount of blood transfer in the hallway. The defendant left three fingerprints at the scene. None of the prints contained blood.

The police asked the defendant's friend to tape record her conversations with the defendant. The tape recordings [**3] were entered into evidence, without objection, and played for the jury. In one controlled call, the defendant explained that she had sent an acquaintance known as Dutch to collect money, and that Dutch told her the victim had screamed at him and threatened to call the police. Dutch told her that he may have hit the victim with the phone.

Another of the defendant's friends also made controlled calls. In one unrecorded call, the defendant stated that she had gone

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to a lady's house to collect some money. In another controlled call, the defendant stated that she did not know what happened to the lady, but she probably died. On yet another call, the defendant continuously denied knowing anything about the victim.

The homicide investigation took two to three years until the Jamaican authorities arrested the defendant. A member of the Jamaican Fugitive Apprehension Team testified that the defendant was using a passport in the name of "Alicia Lueyen." The defendant explained that "Alicia" was the name of a relative of her ex-husband and "Lueyen" was her ex-husband's last name that she kept.

After her arrest, the defendant voluntarily told an authority that she worked as an aide for a woman and **[**4]** she confronted her about money that was owed with her friend "Frost." She claimed the woman stabbed her with a knife, and showed the resulting scar on her hand. This led to the woman being struck in the face by Frost. They took the knife, leaving the woman on the floor bleeding, and drove away in the vehicle that had been described by the neighbor.

The defense contended that Dutch committed the murder. To support this theory, the defense attempted to introduce evidence that Dutch had failed a polygraph test administered by the Office of the State Attorney. The polygraph report revealed that two of Dutch's answers to polygraph questions showed deception: (1) was he ever at the victim's apartment; and (2) was he present when she was killed. The defense orally moved to cross-examine Dutch about the polygraph results. After some discussion, the court denied the defense motion. The court specifically found **[*721]** that the "potential relevance for impeachment and otherwise is far outweighed by the potential prejudice."

The State called Dutch as a witness. He testified that he had collected some debts for the defendant, but he did not accompany her to the victim's house for that purpose. During cross-examination, **[**5]** defense counsel asked Dutch about his trip to the State Attorney's office.

[Defense Counsel] Did you come down here to the courthouse?

A. Pardon me?

Q. Do you recall coming down here to the courthouse?

A. Yeah, I came to the courthouse.

Q. You came to the State Attorney's Office?

A. Yeah, I came to do a polygraph.

Q. I don't have any further questions.

At the conclusion of Dutch's testimony, defense counsel objected to Dutch's response concerning the polygraph. He suggested the only way to cure the impression left by the testimony was to allow him to impeach Dutch with the polygraph results. The trial court responded:

> Whether he passed or he didn't, he said he came to take a polygraph, he didn't say he took the polygraph, and the fact is, I'm going to tell the jury whether he did or didn't take the polygraph, or whatever occurred, is irrelevant, not to be considered by them. The case law is very clear on this.

When the court inquired about a curative instruction, defense counsel repeated the only way to cure the problem was to allow him to impeach Dutch with the results of the polygraph. The court then asked if defense counsel waived a curative instruction. Defense counsel responded: "Well, **[**6]** you're going to give the instruction you feel is appropriate." Defense counsel then suggested that the court instruct the jury that the witness went to take a polygraph and whether he passed or not should not be considered by the jury. The court then gave the following instruction:

> Ladies and gentlemen, there was a reference by the witness that he came to the courthouse to take a polygraph examination. Polygraph examinations are clearly not relevant, not admissible, and not before you. Whether he did or did not ultimately take that examination, or anything that occurred, is completely irrelevant and not something you should consider and not something before you. Okay? It just happened to be blurted out by the witness. So, A, it's not before you whether he did actually take the polygraph; and, B, if he did take the polygraph it's not before you what the results are.
>
> What I'm telling you now is you are to completely disregard that answer that was blurted out. Do we understand that? Don't assume anything. Don't speculate, oh, he took it, he passed, or he took it, he failed. Don't assume that he took it, don't assume whatever any results are. Do we understand that? Can you promise me that? **[**7]** That's kind of crucial.

Trial for that day ended after the curative instruction.

The next morning, defense counsel moved for a mistrial arguing Dutch's testimony had left the jury with the impression that he had passed the polygraph, the testimony was prejudicial, and the curative instruction was insufficient to remove the taint. The court asked whether there was anything else it could do to "inoculate the jury." Defense counsel answered "no." After a lengthy discussion, the court

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denied the motion for mistrial. Defense counsel marked the polygraph report as an exhibit for appellate purposes.

[*722] The State made the following comment during closing argument.

> This is a case that is building. The moment that name Dutch came out, as a good law enforcement officer, as a good investigator, you have to consider all possibilities now, all bets are off. So it's not that anybody thought he really did it. I mean, everything she is saying, it's all confusing.

Defense counsel did not object to the statement. After the State's closing, defense counsel renewed the motion for mistrial and argued that the State's closing had increased the prejudice of Dutch's reference to the polygraph examination. The court **[**8]** denied the motion.

The jury returned a guilty verdict on one count of first degree murder. The court sentenced the defendant to life in prison without the possibility of parole.

The only issues we address concern the trial court's handling of the polygraph. First, the defendant argues that the court erred in initially denying the defendant's request to impeach Dutch with the results of the polygraph. Second, the unanticipated polygraph testimony became particularly prejudicial because it left the jury with the impression that Dutch passed the test, which directly contradicted the defendant's theory that Dutch had committed the murder. And third, the error was compounded when the prosecutor argued in closing that Dutch had never really been a suspect.

The State has several responses. First, the issue was not preserved because the objection was untimely. [1] Second, even if preserved, the trial court did not abuse its discretion when it denied the request to impeach Dutch with the results of the polygraph examination. Third, the trial court cured any error by its instruction. Fourth, the court did not err in denying the motion for mistrial because the jury was neither informed of whether **[**9]** the polygraph was taken nor of the actual results. And fifth, the error, if any, was harmless.

HN1[↑] The admissibility of evidence lies in the sound discretion of the trial court; we will not reverse a ruling unless there has been a clear abuse of that discretion. *Ray v. State, 755 So. 2d 604, 610 (Fla. 2000)*. This general rule is tempered by Florida's "more conservative approach to the admission of [polygraph] evidence." *McFadden v. State, 540 So. 2d 844, 846 (Fla. 3d DCA 1989)*. Absent an agreement between the state and defense, the results of a polygraph examination are inadmissible because they have not been shown to be sufficiently reliable to warrant their use in judicial proceedings. *See United States v. Scheffer, 523 U.S. 303, 309, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)*; *Davis v. State, 520 So. 2d 572 (Fla. 1988)*.

Here, there was no stipulation. Thus, initially the trial court properly denied the defense request to cross-examine Dutch **[**10]** about the polygraph examination. When Dutch indicated that he had gone to the Office of the State Attorney to take a polygraph, the issue arose for a second time.

While defense counsel did not immediately object, as soon as the questioning concluded, counsel brought the issue to the court's attention. The court again advised the defense it would not allow cross-examination of Dutch and provided a thorough curative instruction, advising the jury not to consider the testimony. The court went **[*723]** out of its way to fashion an instruction to protect any harm the single word may have caused. The court also noted that there had been no indication that Dutch took the polygraph or what the results of the polygraph were.

HN2[↑] A motion for mistrial is left to the sound discretion of the trial court. We review such decisions for an abuse of discretion. *Salazar v. State, 991 So. 2d 364, 371 (Fla. 2008)*. A mistrial should be granted only when the error vitiates the entire trial. *Id. at 372*. "[N]ot every reference to a polygraph exam is inadmissible, nor does every improper admission of the taking of a polygraph exam require a mistrial." *Olivera v. State, 813 So. 2d 996, 998 (Fla. 4th DCA 2002)* (quoting *McFadden, 540 So. 2d at 845*). **[**11]** We find the mention of the word polygraph in this case significantly distinguishable from the admission of having taken a lie detector test in *Olivera*.

In *Olivera*, the state unintentionally elicited that its only key witness had **taken** a lie detector test. *813 So. 2d at 997*. The trial court sustained the objection, gave a short curative instruction, and denied the motion for mistrial. *Id.* The jury convicted the defendant on all charges. *Id. at 998*. But we reversed, based on the unique facts of the case. *Id. at 999*.

In *Olivera*, there was no physical evidence and no witnesses placing the defendant at the scene. *Id. at 997*. The entire case was built on one witness alone, who testified that the defendant had made inculpatory statements to him. *Id. at 998*. That witness had not come forward until two years following the murder, and only after being threatened with deportation

[1] While defense counsel waited to object until the end of Dutch's testimony, he later renewed the objection, and moved for mistrial. Defense counsel explained to the court that he did not immediately object so as to not draw attention to the remark. We find the issue sufficiently preserved.

Appendix F

by law enforcement and eviction by family members unless he implicated the defendant. *Id. at 997*. He was the son of the dead perpetrator, was on probation, had admitted to using marijuana, and had made prior inconsistent statements denying any knowledge of the crime. *Id.* In short, he had been significantly discredited **[**12]** by defense counsel. "Thus, unless the jury believed that he had passed the lie detector test, it is hard to fathom that his testimony would have led to the defendant's conviction . . . ." *Id. at 998*.

In *Olivera*, we cautioned "that the mention of the 'three little words' [lie-detector test] does not, ipso facto, require" a reversal. *Id.* This is just such a case. Here, Dutch's mere mention that he went to the state attorney's office to take a polygraph is not the same as indicating that he had in fact taken the exam or the results of the exam. *Cf. Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982)*. The comment was not elicited by the State, but came as a result of defense counsel's cross-examination when it was clear that defense counsel wanted to cross examine Dutch about the polygraph.

Dutch did not suffer the same credibility issues as the witness in *Olivera*. There were multiple witnesses and substantial evidence inculpating the defendant. A friend of the defendant confirmed a conversation in which the defendant complained about not being paid for services. Other cell phone records confirmed numerous calls from the victim's location. The defendant left the country abruptly. Recorded **[**13]** conversations suggested the defendant's involvement leading to the death of the victim. Under the facts of this case, we find no error in the trial court's denial of the motion for mistrial.

This holding is bolstered by the great lengths taken by the trial court to insure that the one little word was not considered by the jury in its deliberations. The court clearly and forcefully advised the jury that polygraph examinations were irrelevant, that it was neither to consider **[*724]** whether a test was taken nor the possible results. The court instructed the jury to completely disregard Dutch's answer. At the close of the trial, the trial court instructed the jury that it was only to consider the evidence introduced in the trial, and that if it disregarded his instructions the verdict would be a miscarriage of justice. We further hold that the court's curative instruction cured any prejudice that may have resulted.

For these reasons, we affirm the defendant's conviction and sentence. We find no merit in the other issues raised.

Affirmed.

POLEN and GERBER, JJ., concur.

End of Document

Appendix E

Exhibit C3

Office of the
PUBLIC DEFENDER
SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY

BROWARD COUNTY COURTHOUSE
201 S.E. 6TH STREET, NORTH WING, THIRD FLOOR
FORT LAUDERDALE, FLORIDA 33301
TELEPHONE (954) 831-8650
SUNCOM 454-8650
This Writer's Phone Number (954) 831-6750

HOWARD FINKELSTEIN
PUBLIC DEFENDER

Attorney-Client Privilege Communication

June 1, 2007

Charlene Rosa
#580500776
NBB - Broward County Jail

Re: State v. Rosa

Dear Ms. Rosa:

Today Michael Etienne and I came to the jail to play you the tape recordings of telephone conversations. As related to you previously, Maxine and Omar assisted the police by agreeing to have their telephone conversations recorded. According to the police and the prosecutor, Maxine and Omar spoke to you via telephone while you were in Jamaica. When I previously related this information to you, you did not believe me. Therefore, I brought the tape recordings to the jail for you to listen to.

We listened to a tape-recording dated August 7, 2002, which was a little over a month after you returned to Jamaica, that the police and prosecution contend is a conversation between you and Maxine. On the tape-recording, Maxine asks to speak with Charlene and the person answering identifies herself as Charlene.

You told us that the voice on that tape-recording was not you. I showed you the other tape recordings, related the dates of the conversations, and identified the parties the prosecution contends participated in the conversations. You told us that you did not want to listen to any of the other tape- recordings, because you were not the person recorded. Thus, I honored your request and did not play the rest of the tape recordings. If you change your mind, please say so. Either Michael or I will come to the jail and play them for you.

After I got back to the office, I had an e-mail from Mr. Frankel. We may be able to go to trial in the next couple of months. I will know more on Monday. I know you would like get this matter resolved. There are only two ways that this case is going to resolve itself – go to trial or plead guilty. In that you have repeatedly told me that you are not guilty, the road ahead is clear – we will go to trial.

Exhibit L 4

letter from Public Appeal Counsel Involuntary Plea. Appellant Properly and Timely object to defense counsel Felony murder theory plea. Involuntary Waiver of not guilty plea. properly object to the direct Appeal

Office of the Public Defender
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA

421 3RD STREET
WEST PALM BEACH, FLORIDA
33401-4297

Carey Haughwout
PUBLIC DEFENDER

Ellen Griffin
ASSISTANT PUBLIC DEFENDER
561-624-6560

Appendix to see Exhibit L 4

December 3, 2008

Ms. Charlene Rosa
#L06814 Dorm M2
Lowell Correctional Institution/Annex
11120 N.W. Gainesville Road
Ocala, Florida 34482

Re: DCA Case No. 4D07-2778

Dear Ms. Rosa:

I have received your letter regarding the state's answer brief and wanted to assure you that a plan to file a reply brief. That brief is now due at the end of April. I also plan, at least at this time, to request oral argument in your case.

You specifically mention the state's response to our argument about your use of a "false name" and state you can prove that you did not get the passport in connection with Ms. Salzman's death. While that may be true, I cannot introduce new evidence on appeal. I will do my best to make the argument with the evidence and testimony already in the record.

Similarly, we cannot attempt to introduce any new evidence, such as a voice analysis, to prove it was not you on the tapes.

Enclosed is another copy of the initial brief. If the direct appeal fails, I will forward everything I have to you to use in any postconviction proceedings.

Sincerely,

Ellen Griffin
Assistant Public Defender

Exhibit L5

Involuntary Plea

Appellant prop...
Timely Object to Felony Theory Plea by de... Cou...
TC 10.27 Involunta... Waiver not gui... Plea

**IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA**

STATE OF FLORIDA, Plaintiff, v. CHARLENE ROSA, Defendant.	CASE NO.: 04-10827CF10A JUDGE: LEVENSON

RECEIVED CLERK, CIRCUIT COURT BROWARD COUNTY, FL 06 OCT 20 PM 1:20

ORDER DISMISSING DEFENDANT'S MOTION TO DISCHARGE

THIS CAUSE comes before the Court upon Defendant's *pro se* Motion to Discharge, brought pursuant to Fla. R. Crim. P. 3.191(a)(2). Having considered Defendant's motion, applicable law, and being otherwise fully advised in the premises, this Court finds as follows:

Defendant files the instant motion *pro se*, wherein she is currently represented by counsel. Thus, the motion is a legal nullity. If Defendant wishes to file any pleadings while represented by counsel, she must confer with her attorney and the motion must be filed therefrom. This Court further notes that Defendant has a court date currently scheduled for October 27, 2006. Accordingly,

It is **ORDERED AND ADJUDGED** that Defendant's Motion is hereby **DISMISSED.**

DONE AND ORDERED on this 19th day of October, 2006, in Chambers, Fort Lauderdale, Broward County, Florida.

JEFFREY R. LEVENSON
CIRCUIT JUDGE

Copies furnished to:

Office of the State Attorney

Harry Dohn Williams Jr., Esq.
Attorney for Defendant
Office of the Public Defender

Charlene Rosa #580500776
Sheriff's North Jail
P.O. Box 407003
Fort Lauderdale, Florida 33340

Exhibit L5

Exhibit

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 04010827CF10A
JUDGE BARBARA MCCARTHY

STATE OF FLORIDA :
Plaintiff :
v. :
:
CHARLENE ROSA :
Defendant :

NOTICE PURSUANT TO RULE 3.220(b)(4)

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, pursuant to Rule 3.220(b)(4), Florida Rules of Criminal Procedure, submits the following information which is in the State's possession or control which may fall within the purview of Brady v. Maryland and/or Rule 3.220(b)(4):

Please be advised that on April 12, 2016, the Broward Sheriff's Office (BSO) DNA Crime Laboratory was advised by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board that there was, "(I)nappropriate use of the statistic known as the Combined Probability of Inclusion (CPI) to calculate statistical significance of occurrence of genetic profiles when allelic dropout is known and/or suspected to have occurred." We have been advised that CPI calculations were only used by the BSO DNA Crime Lab in complex DNA mixture cases. Documents regarding this matter may be found at **http://www.sao17.state.fl.us/BSODNA_ASCLD.pdf**

This notice is being sent to you because our records indicate that you were a party in this case and there may have been DNA evidence tested by the Broward Sheriff's Office Crime Laboratory. If there was DNA evidence in your case, there has not been a determination whether the CPI calculations were utilized or whether the evidence was relevant in your particular case. This matter is being brought to your attention because the DNA population genetic calculations may have been inaccurately tabulated. Please contact your attorney to further discuss this information.

I HEREBY CERTIFY that a true copy hereof has been furnished Electronically this 28th day of July, 2017, to
counsel for the defense: Harry Williams, Esquire, 990 NW 5th Street, Boca Raton, FL 33486-3432
CC: Defendant At Large

MICHAEL J SATZ
State Attorney

By: _____
SHARI TATE, ESQUIRE
Assistant State Attorney
Fl Bar #879150
201 S.E. 6th Street
Unit HTU
Ft Lauderdale, FL 33301
Service Email: CourtDocs@sao17.state.fl.us

Exhibit d