

IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,
v.
CASE NO.: CF16-008507-XX

TIMOTHY STEMEN,

Defendant.

**ORDER DENYING DEFENDANT'S AMENDED MOTION FOR POST CONVICTION
RELIEF**

THIS MATTER is before the Court upon Defendant's *Amended Motion for Post Conviction Relief*, filed March 2, 2020, pursuant to Rule 3.850, Fla. R. Crim. P. After consideration of the Motion, and being otherwise fully informed, the Court finds as follows:

In his Motion, Defendant raises the following claims for relief:

- 1) Trial counsel provided ineffective assistance of counsel in failing or refusing to file a bond reduction motion.
- 2) Trial counsel provided ineffective assistance of counsel in committing numerous errors.
- 3) Trial counsel provided ineffective assistance of counsel in failing to review the evidence.
- 4) Due to Trial counsel's ineffective assistance, Defendant's right to due process and protection under the law was violated.
- 5) Trial counsel provided ineffective assistance of counsel in forcing Defendant to enter a plea.¹
- 6) Trial counsel provided ineffective assistance of counsel in failing to investigate and present evidence or file any motions on Defendant's behalf.

¹ For clarification, the Court has renumbered Defendant's grounds for relief. Grounds 5 through 12 in this Order correspond to and reference Grounds 7 through 14 in Defendant's Amended Motion, respectively. Defendant's Ground 15 (which is not a ground for relief, per se), explains how appellate counsel failed to file a corrected certificate of service, as ordered by the Court, and did no other postconviction work in Defendant's case.

- 7) Trial counsel provided ineffective assistance of counsel in failing to request a pre-sentencing investigation.
- 8) Trial counsel provided ineffective assistance of counsel in failing to depose the lead investigator.
- 9) Trial counsel provided ineffective assistance of counsel in failing to ensure plea offer was close to a guideline scored sentence.
- 10) Trial counsel provided ineffective assistance of counsel in texting on her phone and doodling during visits with Defendant.
- 11) Trial counsel provided ineffective assistance of counsel in failing to ensure Defendant's presence at all hearings.
- 12) Trial counsel provided ineffective assistance of counsel in committing any single error.
- 13) Defendant's sentence is excessive and Trial counsel failed to argue that the scoresheet was incomplete.²

Procedural History

On November 1, 2016, Defendant was charged with Lewd Conduct, a second-degree felony. On March 17, 2017 Defendant entered a negotiated plea and was sentenced to 30 months prison. On June 13, 2017, Defendant filed a motion for jail credit which the Court granted in part and awarded Defendant one additional day of credit. On June 21, 2017, Defendant filed a motion to mitigate sentence which the Court denied. Defendant appealed and the appellate court per curiam affirmed. On June 5, 2018, Defendant filed a motion for postconviction relief. After being stricken with leave to re-file, Defendant filed a facially sufficient postconviction motion on March 2, 2020. On June 10, 2020, the Court ordered the State to show cause and also denied Defendant's claims 1, 2, 4, 6, 7, 9, 10, and 11. The State filed its response on July 21, 2020.

Relevant Factual Background

On October 4, 2016, Felicity Stemen contacted the Polk County Sheriff's Office and reported her husband, Defendant, was having her fourteen-year old daughter, S.T., try on underwear in his presence. *See Arrest Report, State v. Stemen, CF16-008507-XX* (Fla. 10th Cir. Oct. 13, 2016). On September 30, 2016, Felicity found a receipt from Victoria Secret which

² Although Defendant fails to characterize this argument as a ground for relief in his Amended Motion, the Court will treat Defendant's excessive sentence claim as such.

showed Defendant had ordered five pairs of underwear. *Id.* When Felicity confronted Defendant, Defendant stated the underwear were for Felicity. Felicity was doubtful because the underwear were not her size. *Id.* Felicity asked S.T. if Defendant bought the underwear for her and S.T. answered in the affirmative. *Id.* Felicity also asked S.T. if Defendant made her try on the underwear and S.T. responded in the affirmative. *Id.* During a forensic interview, S.T. stated Defendant had her try on underwear in his presence on three different occasions. *Id.* S.T. stated Defendant took photos of her in the underwear during two of those occasions. *Id.* Initially, Defendant denied all allegations. *Id.*

Legal Framework

Judicial scrutiny of counsel's performance must be highly deferential; therefore, the court must carry a strong presumption, which defendant must overcome, that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The proper standard for attorney performance is that of reasonably effective assistance under prevailing professional norms. *Strickland*, 466 U.S. at 687. When a convicted defendant alleges ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88.

A Defendant must make two (2) showings to succeed on a claim that counsel's assistance was so defective as to require reversal of a conviction. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* Where counsel could have easily determined that the defendant's plea would make him eligible for deportation, counsel is deficient under the first *Strickland* prong in failing to give the defendant correct and unequivocal advice regarding the deportation consequences of his plea. *Padilla v. Kentucky*, 559 U.S. 356, 368-69 (2010). Second, the defendant must show that the deficient performance prejudiced the defense. *Strickland*, 466 U.S at 687. In the plea context, a defendant satisfies the prejudice requirement only where he can demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hernandez v. State*, 124 So.3d 757, 762 (Fla. 2012). The defendant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Hernandez*, 124 So.3d at 762.

Claim 3

Defendant argues trial counsel was ineffective in failing to review a compact disc containing photographs. Defendant fails to describe the nature of the photographs or state how they are relevant to the case. Additionally, Defendant has failed to show how counsel's failure to view the photographs prejudiced his defense. Accordingly, Defendant's third claim is legally insufficient to show either deficient performance or prejudice. Defendant's claim three is **denied**.

Claim 5

Defendant argues trial counsel was ineffective in forcing Defendant to enter a plea by advising Defendant to take any offer the State presented. Defendant contends trial counsel gave him the impression that Defendant's only option was to accept a plea deal. Pursuant to Rule 3.172(c), Fla. R. Crim. P., a trial judge is required to make certain inquiries of defendants and issue standard warnings to ensure the voluntariness of their plea. When determining the voluntariness of a plea, the judge must place the defendant under oath, address the defendant personally, and determine on the record that the defendant understands certain rights enumerated in Rule 3.172(c). *In re Amendments to the Fla. Rules of Criminal Procedure*, 188 So.3d 764, 766 (Fla. 2015). Additionally, when determining whether a reasonable probability exist that a defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at trial. *Grosvenor v. State*, 874 So. 2d 1176, 1181-82 (Fla. 2004).

Here, Defendant entered a negotiated plea. During said plea Defendant confirmed with the Court that he understood he had a right to proceed to trial and that by entering a plea he would be waiving that right. *See Plea, Stemen v. State*, CF16-008507-XX at 8-9 (Fla. 10th Cir. Mar. 17, 2017). Additionally, the Court also asked Defendant, "Has anyone promised you anything, outside the written agreement, or threaten you in any way to get you to enter this plea?" *Id.* at 11. Defendant answered in the negative. *Id.* Further, the Court asked Defendant if he wanted to say anything and Defendant responded in the negative. *Id.* at 12. Defendant had ample opportunity to inform the Court that counsel was forcing Defendant to take the plea offer if that

was the case. However, Defendant did no such thing and even told the court he was satisfied with trial counsel's advice. *Id.* at 11.

Although Defendant contends he would have insisted on going to trial, under the totality of the circumstances, said contention does not appear reasonable. Foremost, Defendant was facing a maximum sentence of 15 years imprisonment at trial. The negotiated plea consisted of 30 months imprisonment followed by 12.5 years of sex offender probation. Additionally, Defendant does not provide the Court with facts sufficient to ascertain whether he had a defense that was likely to succeed at trial. Further, based on the colloquy between the Court and Defendant during the plea, Defendant knew he was waiving his right to present a defense at trial and was not threatened or coerced to enter the plea. Accordingly, Defendant's claim five is **denied**.

Claim 8

Defendant argues trial counsel was ineffective in failing to depose Jadell Jack of the Polk County Sheriff's Office. Defendant contends Jack would have testified that it is impossible to find evidence in an email on one device but not the other when the two devices were purchased at the same time and were linked by the same email address. Although nothing may have been found on Defendant's iPhone, Defendant fails to acknowledge that photographs, preserved on a compact disc, were found on his iPad. (See attachment) Jack could have authenticated the photographs and testified as to their content. Furthermore, Defendant has failed to show prejudice. It is very unlikely Jack's testimony would have been helpful to Defendant. Accordingly, Defendant's claim eight is **denied**.

Claim 13

Defendant argues his sentence is excessive and trial counsel was ineffective in failing to argue Defendant's scoresheet was incomplete. Defendant entered a negotiated plea and was sentenced to 30 months prison followed by probation accordingly. Defendant's sentence is well within the statutory maximum for his offense, a second-degree felony. To the extent that Defendant is claiming the trial judge erred in imposition of sentence, such claim should have been raised on direct appeal. *See Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001). As it relates to Defendant's scoresheet, Defendant pleaded guilty to violating Florida Statute 800.04(6)(b), a Level 6 offense. Defendant scored 36 points; the scoresheet is not erroneous. (See attachment)

Trial counsel was not deficient in failing to make a meritless objection. Accordingly, Defendant's claim thirteen is **denied**.

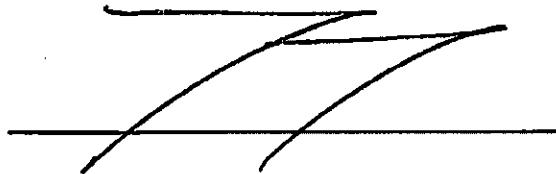
Claim 12

Defendant argues trial counsel was ineffective in committing any single error. Defendant fails to show individual error; therefore, his claim fails. Accordingly, Defendant's claim twelve is **denied**.

Based on the above, it is **ORDERED AND ADJUDGED** that Defendant's Motion is **DENIED in toto**. Defendant has thirty (30) days from the date of this Order in which to appeal this Order to the Second District Court of Appeal.

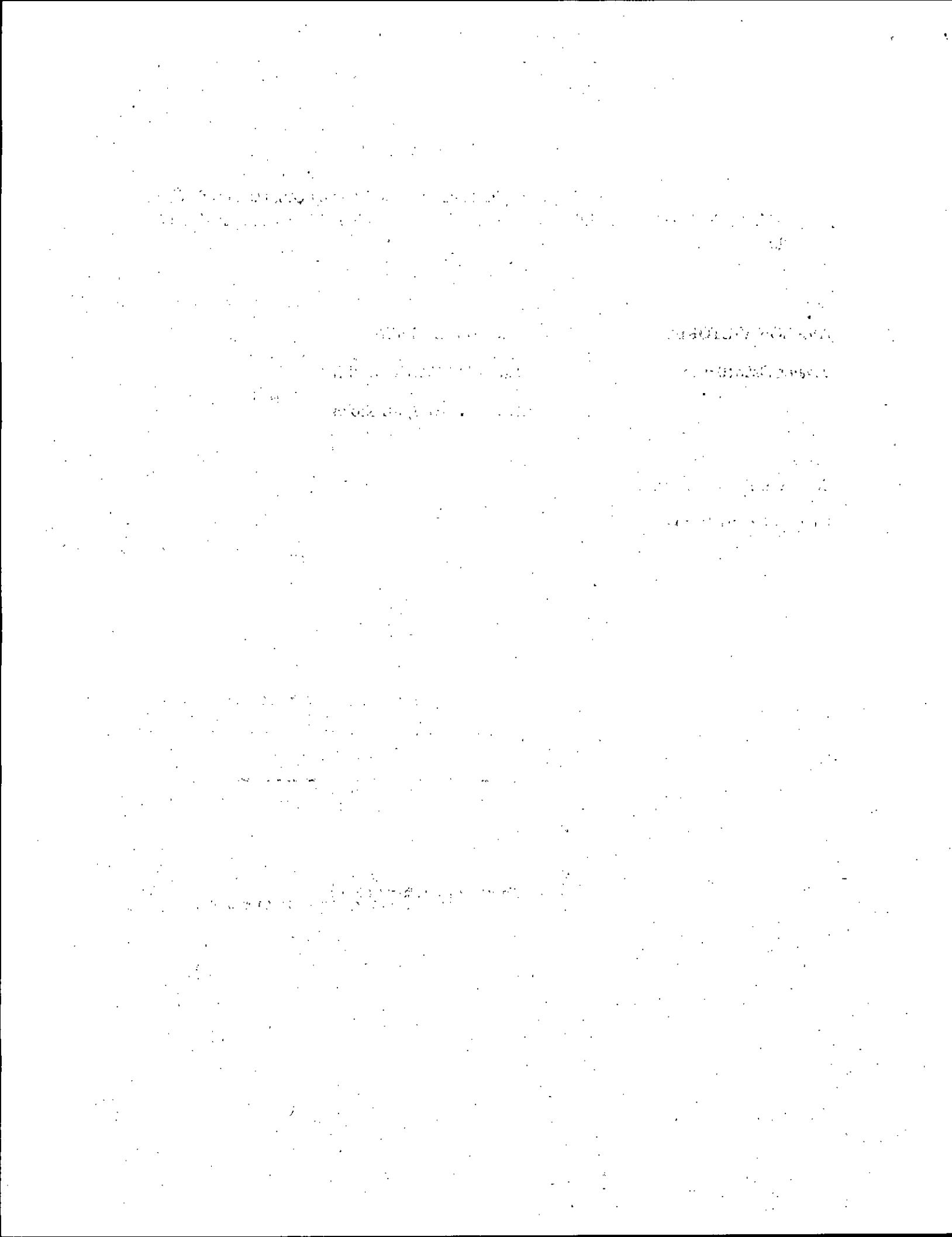
DONE AND ORDERED in Bartow, Polk County, Florida on Monday, September 14, 2020.

53-2016-CF-008507-A000-XX 09/14/2020 06:13:00 AM

A handwritten signature in black ink, appearing to read "KEVIN ABDONEY", is written over a horizontal line. The signature is fluid and cursive, with a distinct upward flourish at the end.

Kevin Abdoney, Circuit Judge
53-2016-CF-008507-A000-XX 09/14/2020 06:13:00 AM

JKA/jdo



client is on board to plea, he is set for March 17th. Let me know if he can still take the offer!

Thanks!

On Mon, Mar 6, 2017 at 7:51 AM, Jennifer A. Swenson <jswenson@saol0.com> wrote:

Hi Brianna,

The iPad CD should have everything. Initially I had anticipated that it would not be able to be sent, but based on the nature of the images, I felt that they could. The search warrant has an inventory receipt noting the "CD of pictures" was recovered. Rushing's reports also have a property section that indicates the evidence he collected. I have disclosed all the DCF records I have in my possession. I will check to see whether Jadell Jack wrote any reports and will send them to you if they were done.

Thank you,

Jennifer A. Swenson

Assistant State Attorney

Office of the State Attorney

Tenth Judicial Circuit

Telephone: (863) 534-4857

Fax: (863) 534-4988

From: Brianna Conway [mailto:bconway@pd10.org]
Sent: Sunday, March 05, 2017 8:32 PM
To: Jennifer A. Swenson
Subject: 16CF008507

Hi Jennifer,

I was wondering about some discovery, I received a CD with video recording of the photographs I think are from the IPAD. I was wondering if anything else was recovered because I noticed the discovery disclosure

says View only at the SAO office, I don't plan on viewing unless this actually goes to trial but I just want to know what exactly exists or if any property/evidence reports were created. Also did Jack Jadell create a report? Also I have a DCF report and final CPT report. Is there a final DCF report.

Thanks!

Brianna Rose Conway

Assistant Public Defender

Office of the Public Defender

10th Judicial Circuit

255 N. Broadway - 3rd Floor

P.O. Box 9000-PD

Bartow, FL 33831-9000

Brianna Rose Conway

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Bartow, FL 33831-9000

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

TIMOTHY STEMEN,)
Appellant,)
v.) Case No. 2D20-2806
STATE OF FLORIDA,)
Appellee.)

)

Opinion filed May 19, 2021.

Appeal pursuant to Fla. R. App. P.
9.141(b)(2) from the Circuit Court for Polk
County; Kevin Abdoney, Judge.

Timothy Stemen, Pro se.

PER CURIAM.

Affirmed.

SILBERMAN, MORRIS, and LUCAS, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

July 02, 2021

CASE NO.: 2D20-2806
L.T. No.: CF16-008507-XX

TIMOTHY STEMEN

v. STATE OF FLORIDA

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's amended motion for rehearing is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

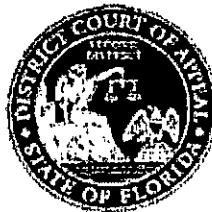
ATTORNEY GENERAL, TAMPA
TIMOTHY STEMEN

C. SUZANNE BECHARD, A.A.G.
STACY BUTTERFIELD, CLERK

mep

Mary Elizabeth Kuenzel

Mary Elizabeth Kuenzel
Clerk



M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

SECOND DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL, AND
AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS
BE HAD IN SAID CAUSE, IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF
THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS ORDER,
AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE ROBERT MORRIS CHIEF JUDGE OF THE
DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT, AND
THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

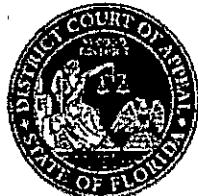
DATE: July 21, 2021

SECOND DCA CASE NO. 20-2806

COUNTY OF ORIGIN: Polk

LOWER TRIBUNAL CASE NO. CF16-008507-XX

CASE STYLE: TIMOTHY STEMEN v. STATE OF FLORIDA



Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

cc: (without attached opinion)
ATTORNEY GENERAL, TAMPA
TIMOTHY STEMEN

C. SUZANNE BECHARD, A.A.G.

mep

Supreme Court of Florida

THURSDAY, JULY 29, 2021

CASE NO.: SC21-1107

Lower Tribunal No(s).:
2D20-2806; 532016CF008507A000XX

TIMOTHY W. STEMEN

vs. STATE OF FLORIDA

Petitioner(s)

Respondent(s)

This case is hereby dismissed. This Court lacks jurisdiction to review an unelaborated decision from a district court of appeal that is issued without opinion or explanation or that merely cites to an authority that is not a case pending review in, or reversed or quashed by, this Court. See *Wheeler v. State*, 296 So. 3d 895 (Fla. 2020); *Wells v. State*, 132 So. 3d 1110 (Fla. 2014); *Jackson v. State*, 926 So. 2d 1262 (Fla. 2006); *Gandy v. State*, 846 So. 2d 1141 (Fla. 2003); *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002); *Harrison v. Hyster Co.*, 515 So. 2d 1279 (Fla. 1987); *Dodi Publ'g Co. v. Editorial Am. S.A.*, 385 So. 2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No motion for rehearing or reinstatement will be entertained by the Court.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



td

Served:

C. SUZANNE BECHARD
TIMOTHY W. STEMEN
HON. STACY M. BUTTERFIELD, CLERK
HON. JON KEVIN ABDONEY, JUDGE
HON. MARY BETH KUENZEL, CLERK